



PhD Thesis

Topic:

The WTO and Developing Countries: *The Missing Link of International Distributive Justice*

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Declaration

‘Whilst registered as a candidate for the above degree, I have not been registered for any other research award. The results and conclusions embodied in this thesis are the work of the named candidate and have not been submitted for any other academic award.’

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Abbreviations

AB Appellate Body (WTO Dispute Settlement)

AoA Agreement on Agriculture

APIs Active pharmaceutical ingredients

ATC Agreement on Textiles and Clothing

BBC British Broadcasting Corporation

BCAs Border carbon adjustments

BITS Bilateral investment treaties

BITs Bilateral Investment Treaties

BRICS Brazil, Russia, India, China and South Africa

BTAs Border tax arrangements

CAFTA US-Central American Free Trade Agreement

CDM Clean Development Mechanism

CER Certified Emission Reduction

CESCR United Nations Committee on Economic, Social and Cultural Rights

CTG Council for Trade in Goods (WTO)

DCR Democratic Republic of Congo

DIFC Dubai International Financial Centre

DSB Dispute Settlement Body

DSM Dispute Settlement Mechanism

DSU Dispute Settlement Understanding (Understanding of Rules and Procedures

Governing the Settlement of Disputes, Annex 2 of the WTO Agreement)

EC European Communities

EU European Union

ECJ European Court of Justice

EFPIA European Federation of Pharmaceutical Industries and Associations

ERUs Emission-reduction Units

EU ETS European Union Greenhouse Gas Emission Trading System

FDI Foreign direct investment

FTAA Free Trade Area of the Americas

FTAA Free Trade Area of the Americas

FTAs Free Trade Agreements

G20 The Group of Twenty Finance Ministers and Central Bank Governors

GA United Nations General Assembly

GATS General Agreement on Trade in Services

GATT General Agreement on Tariffs and Trade

GCC Gulf Cooperation Council

GDP Gross domestic product

GHGs Greenhouse gases

GSP Generalised System of Preferences

GIs Geographical Indicators

ICJ International Court of Justice

ICSID International Centre for Settlement of Investment Disputes

IET International Emissions Trading (carbon market)

IMF International Monetary Fund

IPCC Intergovernmental Panel on Climate Change

IPR Intellectual property rights

JI Joint Implementation

LDCs Least-developed countries

MAI Multilateral Agreement on Investment (OECD)

MEAs Multilateral environmental agreements

MFA Multi-Fibre Arrangement

MFN Most favoured nation

MNE multinational enterprise

MOL *Magyar Olaj- és Gázipari Nyrt.*, (Hungarian Oil & Gas Plc)

NAPs National Allocation Plans

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958

NGOs Non-government organisations

NT National treatment

OECD Organisation for Economic Co-operation and Development

PCIJ Permanent Court of International Justice

PPM Process and production method

R&D Research and development

RMG Ready-made garments

RTA Regional Trade Agreement

SCM Agreement Agreement on Subsidies and Countervailing Measures

SDT Special and differential treatment

SMEs Small and medium enterprises

SPS Agreement on the Application of Sanitary and Phytosanitary Measures

TBT Agreement on Technical Barriers to Trade

TCC Trans-national capitalist class

TRIMs Agreement on Trade-Related Investment Measures

TRIPs Agreement on Trade-Related Aspects of Intellectual Property Rights

UAE United Arab Emirates

UNCITRAL United Nations Commission on International Trade Law

UNFCCC United Nations Framework Convention on Climate Change

UNO United Nations Organisation

USTR United States Trade Representative

USTR United States Trade Representative

VCLT Vienna Convention on the Law of Treaties

WIPO World Intellectual Property Organisation

WTO World Trade Organisation

ABSTRACT

This thesis demonstrates that no international distributive justice mechanism is operative in the WTO legal regime, and that SDT and GSP provisions do not compensate for this. It argues that the *erga omnes partes* distribution of the burden of compliance with WTO Agreements frustrates the economic development of the poor developing countries, and that this can be corrected by the distribution of the burdens of compliance on a distributive justice principle. A model climate law is advanced to demonstrate the practicability of applying that principle in the WTO context. The general charge is made that, absent a distributive justice principle in the WTO legal system, developing countries benefit from WTO Agreements only in the measure that they are already trade-capable, and that those Agreements often threaten their established wealth-producing institutions. It is argued that the status 'developing countries' cannot remain a self-designated status, but should correspond with GDP status. Specific charges are levelled against WTO Agreements' failure to take account of the interests of developing countries: TRIPs provisions severely restrict the transfer of technology, and thereby frustrate emerging pharmaceutical industries; the DSM, based on Western legal tradition, imposes a burden of unfamiliarity on developing countries, and its enforcement system is generally not available to them; the GATS tolerates the friction between NT and MFN obligation and FTAs; the GATS and the TRIMs confer the right of one country to invest in another, in the absence of any validating customary international law, yet no WTO Agreement brings foreign-investment dispute settlement into the DSM, leaving the WTO tolerant of BITs and FTAs that nominate non-WTO tribunals for that purpose, despite evidence that many developing countries cannot sustain the financial penalties these tribunals impose.

Chapter 1

Introduction

1.0 Thesis topic

The WTO and Developing Countries: *The Missing Link of International Distributive Justice*

1.1 Thesis statement

This thesis proposes that developing countries can participate advantageously in the World Trade Organisation (WTO) if: (i) they have the means to devise a legal and regulatory system such as that of the United Arab Emirates (UAE), and thereby, develop a capacity to avoid infringement of the WTO legal regime; (ii) they are, unlike China, without fear that their approach to the WTO Dispute Settlement Mechanism (DSM) will attract the ire of the affluent developed countries; and (iii) they have a capacity like Brazil's to enforce Dispute Settlement Body (DSB) decisions in their favour by DSB-sanctioned trade retaliation. Lacking advantages (i) – (iii), the least-developed countries such as Bangladesh have very little capacity for advantageous participation. For the least-developed countries, WTO membership does no more than impose a burden that demands of them a WTO-compliant legal infrastructure that many lack the social conditions and the expertise to construct. It follows that if the WTO is to become a fair, just and inclusive international-trade regime, it must observe the principle of international distributive justice. That this principle can become operative in the WTO regime is

demonstrable, and demonstrated in the course of a proposition that there be a new climate law devised jointly by the WTO and the United Nations Organisation (UN).

1.2 Background of the study

Like any other social experience, experience of the law is accounted for in political, economic and ethical terms. A great deal of the criticism directed at the WTO is expressed in these terms. A necessary background of this research is therefore that criticism: a principled evaluation of it is unavoidable. I therefore approached the evaluation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs),¹ the Agreement on Trade-Related Investment Measures (TRIMs)² and General Agreement on Trade in Services (GATS)³ effects on developing countries under the influence of theorists who contend with what it is that that law must do to be just and fair international law. Theorists exerting the strongest influence on this approach were Narlikar, Garcia, Carmody and Pogge.

1.3 Objectives and scope of the study

The general objective of this study is to add to the ‘legal vein’ of the literature. To do this, it is necessary to move away from the socio-economic-ethic-political approaches,

¹ Annex IC of the Marrakech Agreement.

² This loosely-defined agreement came into effect on 1 January 1995, at the Uruguay Round negotiations. It addressed the trade-related investment measures that exist in violation of Articles III (National Treatment) and XI (general elimination of quantitative restrictions) of the Marrakech Agreement. Its purpose was to prohibit member countries’ efforts to make approval of investment offers conditional upon the willingness of investors to comply with their local laws and regulations that favour domestic products.

³ This WTO treaty entered into force in January 1995, as a major outcome of the Uruguay Round of negotiations. Its purpose was to extend the multilateral trading system to services, in the way that the General Agreement on Tariffs and Trade (GATT) regulates trade in goods. Its major objectives are the creation of international trade rules, the establishing of the principle on non-discrimination among participants, and the promoting of the progressive liberalisation of trade.

and to watch instead the ‘law in action’ occurrences in the DSM, and in the provisions of the Agreements that constitute WTO law. Distilling a ‘law only’ approach is not *per se* a virtue, for it does not do to ignore political and economic insights into the workings of the WTO, nor is it entirely possible, as the ‘veins’ in the literature demonstrate. This thesis nevertheless strives to concentrate its discussion on the WTO-regarding legal concepts and legal events, and to accommodate in that context a new climate law based on the principle of the ‘international distributive justice’ model that it proposes.

The specific objectives of this study are to:

- (i) evaluate the level of fairness that is operative in the WTO, a global institution that purports to integrate, in a pursuit of common objectives, the political, economic and social interests of the bulk of the world’s countries, the differences in their powers, capabilities and degrees of influence notwithstanding;
- (ii) briefly evaluate the general impact on developing countries, having revised the grouping ‘developed countries’ to include all WTO member states not included in Annex I of the Kyoto Protocol;
- (iii) analyse the legal framework of three major WTO agreements: the TRIPs, TRIMs and GATS, and assess their impact on developing countries, having introduced the idea that international distributive justice entails the distribution of obligations, not goods;
- (iv) analyse the various implications for developing countries of the WTO’s Dispute Settlement Mechanism by assessing the extent to which this legal instrument provides them with the same opportunities and resources as it does the developed countries;

(v) contribute to the development of international climate-change law with the purpose of commending that international distributive justice be its principled commitment.

1.4 Importance and justification of the study

Interest in this topic is justifiable on several grounds:

(i) The representatives and experts of developing countries have repeatedly complained that the legal framework of the WTO and its agreements tend to constitute a barrier to trade for them: As Gene M. Grossman and Alan O. Sykes⁴ have pointed out, with Anastasios Tomazos's⁵ and Patrick Low's⁶ concurrence, the Generalised System of Preferences (GSP) and the Special and Differential Treatment (SDT) are not working as they were meant to, that is, to promote developing nations' trade-capacity growth. And, as Jeffrey L. Dunoff notes⁷, Håkan Nordström's 2006 empirical data⁸ oblige more scholarly research of the systemic WTO problem that inhibits the trade-capacity growth of developing nations.

(ii) As a citizen of the United Arab Emirates (UAE), a country that has invested significant faith in transforming and modernising its economic and commercial interests

⁴ 2007, 'A Preference for Development: The Law and Economics of GSP', in *WTO Law and Developing Countries*, Bermann, G.A. and Mavroidis, Petros C (eds), Cambridge University Press, pp. 255 -282.

⁵ 2007, 'The GSP Fallacy: A Critique of the Appellate Body's Ruling in the GSP Case on Legal, Economic, and Political/Systemic Grounds', in Bermann and Mavroidis, *ibid.*, pp. 306-321.

⁶ 2007, 'Is the WTO Doing Enough for Developing Countries?', in Bermann and Mavroidis, *ibid.* pp .231 – 256.

⁷ 2007, 'Comment on Nordström', in Bermann and Mavroidis, *ibid.* pp. 186 - 194.

⁸ Horn, Henrik and Mavroidis, Petros C, 'The WTO Dispute Settlement System 1995-2004: Some descriptive statistics', 31 January 2006, The World Bank, <http://siteresources.worldbank.org/INTRES/Resources/469232-1107449512766/HornMavroidisWTODSUDatabaseOverview.pdf>.

through its WTO membership, I am personally concerned about the extent to which the legal framework of the WTO constitutes a barrier to trade. It is my mission to contribute to creating more awareness of, and to purvey specific knowledge about, the issues, challenges and concerns that the legal dimensions of WTO practice pose for developing countries.

(iii) An appreciation of the legal impact of the accession to the WTO of the UAE, Bangladesh and Brazil will reveal the dynamics, mechanisms and effects of WTO membership, and will inform the future accession processes of other developing countries. The concepts and debates of this thesis will fight a case for Bangladesh, a country that faces crippling problems that the WTO is failing to ameliorate.

(iv) There is a need to evaluate the manner of, and the extent to which, the legal framework of the WTO, its agreements and the DSM impact differently in discrete state contexts. Brazil, the UAE and Bangladesh are proposed as apt case studies for this purpose because their particular circumstances are perspicuous illustrations of the absence of rationale in the WTO term ‘developing countries’, and because they illustrate the WTO experience of greatly different state structures: the UAE is a hierarchical state, Brazil a state with a firm democratic legal infrastructure, and Bangladesh a state with a weak democratic infrastructure.

1.5 Research questions

Having selected specific research objectives from the sizeable body of WTO issues that warrant investigation, this study pursues answers to the following questions:

1. To what extent is it true that WTO accession imposes a greater burden on developing countries than it imposes on developed countries?
2. What feats of local law reform did the case-study countries, the UAE, Brazil and Bangladesh, have to perform to enable their accession to the WTO?
3. In what ways were the accession challenges that faced the UAE and Bangladesh different from those faced by developing countries such as Brazil, where economic and legal infrastructures were closely approximate to developed, Western-world ones?
4. Which are the specific provisions of the WTO legal framework, particularly of the TRIPs, TRIMs and GATS agreements, that constitute legal barriers to trade for developing countries?
5. How is the legal framework of the DSM biased against developing countries, and what challenges does this bias create for them?
6. Which provisions of the WTO agreement, and of the TRIPs, TRIMs, GATS agreements and of the DSM framework, might be revised with a view to addressing the concerns of developing countries?
7. Can the problems of developing countries be reduced significantly upon the introduction into the WTO legal scheme of the international distributive justice principle in the form that this thesis proposes it?

1.6 Research methodology

This thesis writer first searched the literature, and conducted informal investigations, to identify the WTO-related complaints of developing countries. I then searched the literature in quest of a normative framework upon which the validity of those complaints might be determined or denied. Having found that the distributive justice principle is the requisite norm of the arbitration of this issue, and that no principle of international distributive justice has yet been enunciated successfully, it was necessary to engage in the devising of a model of international distributive justice, and in a demonstration that such a model can become the principled basis of all WTO Agreements. To mount that demonstration, the elements of a new WTO climate law were constructed. This was achieved by (i) identifying the prominent value in multilateral environmental agreements (MEAs) as ‘common but differentiated responsibility’ and explicating the application of this value as an instance of international distributive justice; (ii) noting that the absence in the WTO of that value accounts for the shortcomings in the MEAs – GATT/WTO relationship; (iii) identifying in the Doha Declaration’s *de facto* licence to devise the means that would forge an actual MEAs – GATT/WTO relationship; (iv) proposing that the new climate law is that means; and (v) explicating the parameters of international distributive justice with reference to the United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol. Since the construction of the elements of the new climate law obligated a call for UN involvement in the construction of this law, ‘investor’ problems that are beyond the reach of the WTO were identified, as were the legislative capacities of the UN for bringing into being the elements of the new climate law that would constrain them.

1.7 Structure of the thesis

Chapter 2: The WTO and the Complaints of Developing Countries

Developing countries' complaints are outlined, and it is proposed that their justifiability is assessable in the terms of the 'justice and fairness' theorists, notably Rawls, Garcia, Pogge, who advocate the 'distributive justice' principle, and Narlikar, who distinguishes 'outcome-related justice' and 'procedural justice'. It is argued that there is a symbiotic relationship between distributive justice and development, and that a commitment to development presumes a commitment to distributive justice.

Chapter 3: The WTO Effect and Developing Countries

A re-definition of 'developing countries' is commended, and a model of international distributive justice is advanced to remedy the fact that the effect of WTO agreements is such that they promote development in resource-rich countries, but destroy the capacity for development of resource-poor countries.

Chapter 4: The TRIPs and the Compulsory Licensing Problems of Developing Countries

TRIPs rules fail to serve the very least-developed countries' health interests that they purport to serve. This leaves the TRIPs well short of observing the human right to health.

Chapter 5: Developing Countries and the TRIMs

The TRIMs reason-for-being is to correct the loosely-stated GATT requirement that local regulations guard against violation of the 'national treatment' policy, and that quantitative

restrictions be eliminated. The TRIMs does nothing to improve the position in the WTO of developing and least-developed countries.

Chapter 6: The General Agreement on Trades and Services: How It Does and Does Not Help Developing Countries

The inherent problem of the GATS is in the friction, caused by free trade agreements (FTAs), that it tolerates between the 'national treatment' obligation and the 'most favoured nation' concepts. Accommodating FTAs, it is not clear whether GATS obligations are collective or bi-lateral. No GATS benefit accrues to least-developed countries, other than negatively for their taxation revenue pursuant to the Doha ban.

Chapter 7: Climate Change and Developing Countries: International Distributive Justice in the MEAs - GATT/WTO Relationship

The elements of the new climate law are devised, and the application of the international distributive justice principle is demonstrated.

Chapter 8: The Dispute Settlement Mechanisms of Foreign Investment and Trade: Their Legal and Social Deficits and Their Effect on Developing Countries

The WTO Agreements have not succeeded to bring foreign-investment dispute settlement into the DSM. Investment agreements that nominate the International Centre for Settlement of Investment Disputes (ICSID) as their dispute-resolution forum are dangerous for developing countries.

Chapter 9: Conclusion

Discussion of the propositions and conclusions of this thesis; submission that this thesis writer has succeeded to contribute substantively to the literature with: (i) the proposal that WTO obligations be distributed in accordance with the international distributive justice model this thesis devises; and (ii) the proposal that the self-designated 'developing country' status be abandoned and replaced by an objective designation based on GDP status.

Chapter 2

The WTO and the Complaints of Developing Countries

2.0 Introduction

The purpose of this Chapter is to propound an argument to demonstrate that the fundamental weakness of the WTO regime is the absence in it of a dominant distributive-justice principle. To that end, it outlines the nature and variety of developing countries' complaints, as voiced by them and by commentators. The proposition follows that these complaints, all be they capable of justification, do not constitute the essential critique of the WTO regime. Nor is it fertile to propose that the WTO be scrapped, and a new trade organisation take its place. What is needed is a normative framework capable of discerning fairness and justice in international trade law. The pertinent remarks of Rawls, Nozick, Garcia and Pogge are considered, and the conclusion is abstracted that in order for the WTO regime to become valid international law, it must espouse a principle of distributive justice. That distributive justice has to be an international distributive justice that allocates obligations (it does not re-distribute goods), because WTO law is a law of obligations. It is conceded that Narlikar successfully argues that there is no attention to outcome-related fairness in the WTO regime, for not even procedural fairness obtains there for developing countries: there is no fairness in a procedural context that gives equal status to patently unequal participants. That is considered sufficient for the conclusion that developing countries' complaints are justified. Their justifiability, however, is no more than itself, and is not the central consideration in the need for the radical improvement of the WTO regime. Radical improvement must take the form of

principled revision, such that distributive justice becomes the WTO's core principle. This is peremptory, for the development of developing countries is not made possible without it.

2.1 Complaints about the 'in-group' approach to agreement negotiation

The most common complaint is that developing countries must accept and adapt to rules and regulations that are generally not of their making. This complaint was voiced strenuously quite early in the WTO's life: At the Seattle Ministerial Conference of 1999, the African trade ministers protested about the style of negotiating agreements at WTO ministerial conferences:

There is no transparency in the proceedings, and African countries are being marginalised and generally excluded on issues of vital importance for our peoples and their futures. We are predominantly anxious over the stated purposes to offer a ministerial text at any price tag, including at the cost of procedures intended to secure consensus and participation.⁹

Nothing had changed six years later. As Celso Amorim, Foreign Minister of Brazil, remarked, US and EU delegates often agree privately, then propose *fait accompli* agreements for developing countries to accept:

... in the lead-up to the Cancun Ministerial Conference in September 2003, the United States and the EU once again insisted on defending only their self-interests. The proposal they presented amounted to a consolidation of their existing policies – with very modest gains and even some steps backward. This practice of precooked deals between major trading partners was commonplace in the old days of the GATT. And in Cancun, developing countries were expected to accept the deal with only minor, cosmetic adjustments.¹⁰

⁹ Narlikar, Amrita, 'Fairness in International Trade Negotiations: Developing Countries in the GATT and WTO', vol. 29, issue 8, *World Economy*, 2006.

¹⁰ NPQ website, 16 August 2004, http://www.digitalnpq.org/global_services/global%20viewpoint/08-16-04amorim.html.

Such ‘ready-made’ proposals might reduce the legal cost to developing countries of negotiation and the preparation of proposals. However, with their low levels of legal knowledge, expertise and proficiency, the delegates of developing countries often find themselves approving proposals of which the legal implications are not clear. This approach to proposals, typically of the US and the EU, was, however, rejected during the Cancun Round, when the delegates of developing countries insisted on a multilateral approach to their preparation.¹¹

2.1.1 Complaints about the skewed legal framework

There is little doubt that the legal language, framework and proceedings of the WTO are derived from the legal systems of the US and EU, and that this creates legal challenges for developing-country delegates in WTO forums. It was nevertheless the delegate of St Lucia, one of the smallest countries and economies in the world, who actually led a significant reform of proceedings. Representing St Lucia as a third party to the *EC Bananas*¹² dispute, he insisted on being accompanied by a private foreign legal team, because he was unable to understand the legal terms and proceedings. At his insistence, this right was granted for the first time, and it has now become an accepted practice for developing country delegates.¹³

¹¹ Amorim, C, ‘The new dynamic in world trade is multipolar’, *Financial Times*, 4 August, 2004.

¹² *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, WT/DS16, 28 September 1995.

¹³ Ierley, D, ‘Defining the factors that influence developing country compliance with and participation in the WTO Dispute Settlement System: Another look at the dispute over bananas’, vol. 33, no. 4, *Law and Policy in International Business*, 2002, p. 618.

Specialised legal expertise is not the problem only of developing countries: Awareness of the shortage of legal experts on WTO-related matters in Japan put so much pressure on the government that it is paying serious attention to establishing an institution for training WTO-law experts.¹⁴ The problem, as far as most developing countries are concerned, is that WTO rules are ‘disciplines’ imposed on government policies. That is, developed and powerful countries identify their interests, use the legal framework of the WTO to propose new rules, then put those rules to work in developing countries, even though they are often alien to those countries’ own legal systems.¹⁵

2.1.2 WTO accession rules upset sound working arrangements

There is no right under customary international law of investors to invest in a foreign country. Investment is traditionally a matter of state sovereignty. However, the GATS and the TRIMs open the door to revising this convention of international customary law. With these agreements in place, if a government refuses to allow a certain class of investor to invest in its economy, would the WTO force it to if an aspirant investor’s country brings the refusal before the DSB? ¹⁶ The mechanism for doing so is in place with Articles VI, para. 1, and XXIII, para. 3 of the GATS. (GATS is especially relevant to the banking and financial institutions because they are service industries.)

¹⁴ Kawase, Tsuyoshi, ‘WTO Safeguard Agreement’, RIETI Report No.045, July 27, 2004, http://www.rieti.go.jp/en/rieti_report/045.html.

¹⁵ Charnovitz, S, ‘Triangulating the World Trade Organization’, vol. 96, no.1, *The American Journal of International Law*, January 2002, p. 29.

¹⁶ Mosoti, V, ‘Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the World Trade Organization: Are Poor Economies Caught In Between?’, vol. 26, no.1, *Northwestern Journal of International Law and Business*, 2005, p. 101.

China has certainly been experiencing the threat of DSM action against it for its protectionist banking policy: to date, China's rules governing foreign-funded banking and other financial institutions provide that foreign owners can hold a maximum stake of 20 percent in Chinese financial sector, and that voting rights to foreign investors in any institution in this sector accrue only upon 25 percent of ownership. This has been drawing very heavy criticism,¹⁷ and China stands accused that it is not honouring its WTO commitments pursuant to the WTO Protocol on Accession.¹⁸

The criticism targets especially China's discriminatory foreign-bank-directed rules: Foreign banks in China still may not take RMB deposits from Chinese customers, their RMB lending is limited to their RMB capital, they are not allowed to issue RMB denominated bonds, and they are not permitted to obtain financing through China's stock market. In the interim, and pending greater liberalisation, most foreign banks use inter-bank financing as their main source of funding RMB assets, or loans to customers.¹⁹ Strangely enough, had China become integrated with the global financial system as the GATS would have it do, it would have been part of the breakdown of that system, that is, of the global financial crisis that came to light in late 2008.

¹⁷ Gang, Yi, 2002, China's Accession to the WTO and the Opening and Reform of Financial, Services, in China: Accession to the WTO and Economic Reform, *Foreign Language Press Beijing*, p. 209.

¹⁸ WTO Ministerial Conference, Accession of the People's Republic of China: Decision of 10 November 2001, WTO Doc. WT/L/432, 23 November 2001 (entered into force on 11 December 2001).

¹⁹ Imam, Michael, 2004, 'The Chinese Inter-bank Markets: Cornerstone of Financial Liberation', *China & World Economy*, vol. 12, no. 5, 2004, pp. 28-31.

2.1.3 Complaints about the push for inclusion into the WTO system of non-trade related issues

There are repeated efforts by the WTO to impose legal obligations that are not related to trade on developing countries. One example is the effort by developed countries to push issues such as transparency, corruption and government procurement (the famous ‘Singapore issues’) onto the WTO agenda. These issues, developing countries claim, are domestic issues, and hence, a matter of internal sovereignty and national law. Proponents of the inclusion of these issues argue, however, that these *are* issues related to trade. Specifically, it matters to international trade if the bidding and tendering systems in a country favour certain classes of company and disfavour others. Developing countries respond by pointing out that creating legal obligations with respect to these issues means that the WTO will have the ability to interfere in the internal affairs of governments, forcing them to change their legal systems, and more seriously, to redefine the nature of relationships between their administrations and bureaucracies.²⁰ For example, some EU countries have considered the possibilities of requiring trading partners to eliminate the death penalty, and of demanding the improvement of human rights and labour standards. In all such cases, developing countries have found themselves under pressure to accept Western standards.²¹

²⁰ McCrudden, C and Gross, SG, ‘WTO government procurement rules and the local dynamics of procurement policies: A Malaysian case study’, vol. 17, no.1, *The European Journal of International Law*, 2006, pp.151-185.

²¹ Bagwell, K, Mavroidis, PC and Staiger, RW, ‘It’s a question of market access’, vol. 96, no.1, *American Journal of International Law*, January 2002, p.75.

2.1.4 Complaints about the TRIPs Agreement²²

Alvarez puts his TRIPs apology thus: 'By bringing intellectual property protections into their trade regimes, WTO members de-legitimized the piracy of intellectual property.'²³

This, of course, is a highly partisan position. If one were to substitute 'obstructed the access to knowledge of the most needy' for Alvarez's 'de-legitimized the piracy of intellectual property', one would paint the picture of the TRIPs effect as many developing countries, especially the least-developed of them, see it. As Cullet argues far more cogently, the TRIPs 'constitutes one of the most significant changes in law for developing-country WTO members'.²⁴

By becoming signatories to the TRIPs and adopting its legal standards and demands, developing countries have accepted the creation of an important statutory obligation that regulates the formation of agreements in areas not related to trade issues. This Agreement is as legally binding on members as is any other treaty-status agreement in WTO's legal framework. Indeed, as Charnovitz points out:

The success of adding intellectual property rights during the Uruguay Round (1986-1994) has led many analysts to view TRIPs as a template for incorporating other issues loosely linked to trade into the WTO.²⁵

The TRIPs imposed a new global legal order on the governments of all signatory countries. That this is so is evidenced by the fact that TRIPs imposed an obligation to create a statutory body that implements, administers and monitors its standards. This

²² Again in Chapter 4.

²³ Alvarez, JE, 'The WTO as linkage machine', vol. 96, no.1, *The American Journal of International Law*, January 2002, p. 148.

²⁴ Cullet, Philippe, 'Human Rights and Intellectual Property Protection in the TRIPs Era' vol. 29, no. 2, *Human Rights Quarterly*, 2007, pp. 403-404.

²⁵ Charnovitz, note 15, p. 29.

makes the TRIPs far more demanding than the usual WTO agreement that does no more than prohibit certain acts and practices.²⁶ Although it is true that the TRIPs has encroached also on the legal systems of developed countries, feeling is nevertheless strong in developing countries about its encroachment on their legal systems.

More than any other, the TRIPs provisions concerning the compulsory licensing of patent pharmaceuticals have attracted severe condemnation. Pursuant to Article 31, members may, in accordance with specified rights and obligations, set the grounds for compulsory licensing in their national legislation. Paragraphs (a) - (k) of this Article outline the rules concerning acquisition of the licensing rights, the duration of these rights, and the remuneration due to the patent holder. At the 2005 Hong Kong ministerial conference, the WTO adopted an amendment of the TRIPS agreement that formalised the waiver of Article 31(f) that had been passed two years earlier, permitting the compulsory licensing of essential medicines (including treatments for HIV/AIDS).

Compulsory licensing allows a country facing a health emergency to produce the needed drugs. If no local pharmaceutical industry exists in the afflicted country, its government can import these drugs from another country, which may also be producing them under compulsory licensing. On the face of it, the 'compulsory licensing' exception seems to address the public health interests of developing countries. In practice, however, there are a number of serious problems with it: In the event of a public health emergency, it may take too much time to activate the compulsory licensing privilege. Even if the solution to

²⁶ Levy, CS, 'Implementing TRIPs – a Test of Political Will', vol. 31, no.3, *Law and Policy in International Business*, 2000, p.792.

the emergency were to be in the importation of the needed drugs, the problem would arise of identifying a country that manufactures those drugs under compulsory licence, unless the manufacturing country is also dealing with a similar emergency. Such a coincidence is highly unlikely.

Also, the developing country interested in implementing the ‘compulsory licensing’ exception must first seek the approval of the patent holder, unless a serious emergency exists. The exception is time limited, and applicable to domestic emergencies only. Upon implementation of the exception, adequate remuneration must be paid to the patent holder, and, in the event of dispute as to the amount of that remuneration, the matter becomes subject to judicial review. On top of this, the exemption is only applicable to specific drugs and not to an entire classes of drugs.²⁷ Not without reason, therefore, compulsory licensing is perceived to be extremely impractical, and even unworkable.²⁸

Another problem is that developing countries do not have a sufficient understanding of the technical and legal nature of exemptions granted to them under various WTO agreements such as the TRIPs, TRIMs and GATS: A recent study showed that even the Brazilian government failed to make effective use of exemptions under the TRIPs. The main factors to blame were the lack of adequate understanding of the legal framework of the agreement, not only in the government bureaucracies, but also among health care enterprises in the private sector. If this is the case in a large developing country with a

²⁷ Cullet, note 24, pp. 143-144.

²⁸ Abbott, FM, ‘The WTO medicines decision: World Pharmaceutical trade and the protection of public health’, *The American Journal of International Law*, vol. 99, no.2, April 2005, p.317.

relatively sophisticated legal system, the situation is more likely to be worse in smaller developing countries.²⁹

The TRIPs mandates the protection of patentable agricultural subject matter by means of Article 27, of which ss.3(b)(7) obliges the patent-protection of micro-organisms and microbiological processes, but leaves countries free to exclude plants and animals from this protection, so long as they attach intellectual-property titles to plant varieties, either through patents or through an effective *sui generis* system. The TRIPs provides for mandatory Geographical Indicators (GIs) for wines and spirits by means of Articles 22-24.

At the 6th Ministerial Conference in Hong Kong in December 2006, India and Brazil, holders of many genetic resources with a traditional-knowledge content, led the effort to procure an amendment of TRIPs rules regarding genetic plant materials and traditional (cultural) knowledge. They urged that patent holders be required to disclose the origin of their patents. And, where those patents associate with genetic plant materials or traditional/cultural knowledge, they be required to seek the source country's permission for its continued use, and to share the economic benefits of their use with the source countries. The American Bio-industry Alliance opposed this demand strenuously, arguing that mandatory patent-disclosure obligations will discourage industry from investing in biotechnology source countries (usually developed and least-developed countries). Not even an undertaking for formal negotiation in this matter emerged. Curiously, such an

²⁹ Chaves, GC and Oliveira, MA, 'A proposal for measuring the degree of public health-sensitivity of patent legislation in the context of the WTO TRIPs Agreement', vol. 85, no.1, *Bulletin of the World Health Organization*, January 2007, p. 53.

undertaking was easily obtained by the delegates pressing for a global register of GIs for wines and spirits.³⁰ Not unexpectedly, developing countries view this as callous WTO disregard for the piracy of their genetic materials and indigenous knowledge.

Many commentators, among them Oliveira *et al.*,³¹ have pointed out the provisions of the TRIPs that seriously inhibit the transfer to developing countries of innovative technology. This holds up development, especially in the least-developed countries. As their study shows, the lack of technical knowledge and the absence of an adequate legislative framework impede these countries' ability to exploit even the opportunities the TRIPs offers. Stiglitz *et al.*,³² *inter alia*, comment on the inertness of the compulsory-licensing provisions of the TRIPs that purport to enable developing countries to produce drugs domestically, noting that only a handful of countries, the powerful block of developing countries: India, China, Brazil and Egypt, have established pharmaceutical industries that can benefit from these provisions.

2.1.5 Complaints about the TRIMs³³

The TRIMs agreement has drawn much criticism for its proclivity to harm trade *via* investment. This view is deeply rooted in the neo-classical economic perspective, which has it that investment measures tend to distort trade flows, and for this reason, they are an

³⁰ WTO, 'TRIPs: Reviews, Article 27.3(b) and related Issues, Background and the current situation', November 2008, http://www.wto.org/english/tratop_e/TRIPS_e/art27_3b_background_e.htm.

³¹ Oliveira, MA, Bermudez, JAZ, Chaves, GC and Velasquez, G, 'Has the Implementation of the TRIPs Agreement in Latin America and the Caribbean Produced Intellectual Property Legislation that Favours Public Health?', vol. 82, *Bulletin of the World Health Organization*, 2004, p. 815-819.

³² Stiglitz, JE and Charlton, A, 2005, *Fair Trade for All: How Trade Can Promote Development*, Oxford University Press, pp. 61-63, 116.

³³ Again in Chapter 5.

obstacle to trade liberalisation.³⁴ But economists such as Morrissey *et al.* argue that under certain circumstances, the TRIMs can benefit host countries, claiming that certain TRIMs ‘can be used as effective instruments of development policy, notably through encouraging industry linkages and technology transfer’.³⁵ The developing countries complaint is that the WTO has failed to establish control of investments, effectively leaving their supervision to the institutions named in bilateral investment treaties (BITS), commonly the ICSID. As Bangladesh’s experience shows, that can be a very dangerous situation for developing countries.

2.1.6 The DSM Challenge³⁶

The Dispute Settlement Mechanism (DSM) has fascinated legal scholars and practitioners for being the unique legal development in international trade law that provides a forum for litigation among WTO member states in the event of the violation of any clause of a WTO agreement. According to Butler and Hauser:

The WTO’s litigation procedures differ not only from dispute handling within the old GATT, but in fact from any previous dispute settlement mechanism at any international level.³⁷

Yet the very fact that the DSM is an unprecedented leap in international law is in itself a major challenge for most developing countries. One of their problems is that it is based on Western legal concepts and traditions. Though developing countries constitute more

³⁴ Morrissey, O, ‘Investment and Competition Policy in the WTO: Issues for Developing Countries’, vol. 20, no. 1, *Development Policy Review*, 2001, pp. 63-64.

³⁵ Morrissey, O and Rai, Y, ‘The GATT Agreement on Trade Related Investment Measures: Implications for Developing Countries and their Relationship with Trans-national Corporations’, vol. 31, no. 5, *The Journal of Development Studies*, June 1995, pp. 702-724.

³⁶ Again in Chapter 8.

³⁷ Butler, M and Hauser, H, ‘The WTO Dispute Settlement System: A First Assessment from an Economic Perspective’, vol. 16, no.2, *Journal of Law Economics and Organization*, October 2000, p. 504.

than three quarters of WTO membership,³⁸ their contribution to the development and formation of the DSM was minimal. The insignificant participation of least-developed countries in the process of setting up the legal framework of the DSM has been justified on the ground that the majority of these countries simply did not have the legal expertise and tradition that would have enabled them to participate.³⁹ That, however, does not alter the fact that the access to the DSM of poor developing countries and least-developed countries is very restricted. Since the inception of this body, the number of cases in which the least developed countries have participated as complainants, respondents or even third parties is insignificant:

The poorest countries in the WTO system are almost completely disengaged from enforcement of their market access rights through formal dispute settlement litigation.⁴⁰

Given that least-developed countries are often the objects of unfair practice by developed countries, it is at least odd that the majority of the least-developed countries are reluctant to approach the DSM, even as third parties. (WTO members who join a litigation as third parties are those affected by, but not directly involved in, an instance of violation that a country brings before the DSM as a complaint. Third parties attach themselves to a litigation process by joining the complainant in a 'next friend' capacity, with the intention of supporting the complainant's position.)

³⁸ de Jonquieres, G, 'Wealthier countries no longer call all the shots', *Financial Times*, 24 June 2004.

³⁹ Zunckel, Hilton, 2008, 'An African Awakening in *US-Upland Cotton* : Lessons from LDCS', in *WTO dispute settlement: an African perspective*, Hartzenberg, Trudy, (ed.), Cameron May, p. 106.

⁴⁰ Bown, Chad P and Hoekman, Bernard M, 'Developing Countries and Enforcement of Trade Agreements: Why Dispute Settlement is Not Enough', vol. 42, no 1, *Journal of World Trade*, 2008, p. 182.

The insignificant use of the Dispute Settlement Mechanism (DSM) by the poorer developing countries is unfortunate, for this mechanism can often gain more ground than the consensus process of the negotiations. A landmark case exists to verify this: In *US–Upland Cotton*⁴¹, Brazil, a developing country, filed a complaint against the US, and eventually won. The Dispute Settlement Body (DSB) brought down a ruling against the US, deeming that US subsidies had put Brazilian cotton growers at an unfair disadvantage.⁴²

What makes this case even more significant is that for the first time during the more than ten years of the formation of the DSM, two least-developed countries participated as third parties. They were the sub-Saharan African states of Chad and Benin, both cotton growing countries. Both had joined the Brazilian action on the basis that their exports and access to the global cotton market suffered unfair loss as a result of the US subsidies.⁴³ This case revealed the extent of the challenge that WTO members inexperienced in DSM procedure face as third parties. None of the members of these two African legal teams had any legal experience in this forum. As a matter of fact, they were literally practising proposal writing and submission, and hoping for the best. Without previous experience or technical training in this field of litigation that is like no other in any legal system, the Chadian and Beninese legal teams had to go through considerable difficulty just to learn the most basic steps of procedure. They were required to support their proposals with statistical evidence that pertains not only to the cotton trade in their respective countries,

⁴¹ *United States – Subsidies on Upland Cotton, Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267.

⁴² Ibid. 31 August 2009.

⁴³ Ibid.

but also to that of the complaining country, Brazil, and to that of the entire global cotton market.⁴⁴

After the lack of technical legal knowledge and expertise, the single most formidable challenge to participation in the DSM is the cost of the legal process. In *US–Upland Cotton*, litigation commenced in 2002 and was not concluded until 31 August 2009. On average, a low-complexity case would incur about US\$90,000 in legal expenses, and a high-complexity case about US\$250,000. The additional expenses of data-collection, economic analysis and experts' fees easily add a further US\$100,000 to US\$200,000 to costs. Still more cost accrues as travel expenses, accommodation, communication, paralegal and secretarial salaries, which easily accumulate another US\$500,000 of cost.⁴⁵ Although the final-cost figure may seem insignificant even for a poor developing country, other costs are also incurred in the pre-litigation investigation processes.

Given all these complicated and costly requirements of the legal framework of the DSM, it is not difficult to explain why the majority of developing countries, especially the smaller and poorer ones, have not contributed to, or participated in, the structuring of the DSM's legal framework, nor derived benefit from it. This situation, however, can be corrected, according to Albashar and Maniruzzaman,⁴⁶ and should be, for the sake of the betterment of the DSM and the capacity-building of developing/least developed

⁴⁴ Bown, Chad P et al. note 40, p. 179.

⁴⁵ Ibid. p. 185.

⁴⁶ Albashar, Faisal ASA and Maniruzzaman, AFM, 'Reforming the WTO Dispute Settlement System: A Rethink of the Third Party Right of Access to Panel and Appeal Processes from Developing Countries' Perspectives', vol. 11, no. 3, *The Journal of World Investment & Trade*, 2010, pp. 311-374.

countries. To this end, the third parties rights of developing countries should be extended, endowed with legal certainty and assisted financially. These authors note that:

Developing countries are suffering from a lack of financial means to bring a dispute. They are also handicapped by a lack of legal experts on WTO law. Participating as third parties would be fundamental to overcoming such weaknesses. Third party involvement is vital for developing countries in this respect. Through this participation they will significantly develop their knowledge regarding the process of the dispute and the functioning of the DSM, in a way that would not be possible by being passive members.⁴⁷

They corroborate the importance of developing countries' third-party participation in the DSB process with reference to the same opinion of a former Appellate Body member:

... developing countries should not hesitate to take up this role in appropriate conditions, because their familiarity with the inner workings of the system will stand them in good stead.⁴⁸

They cite also, among other kindred observations, Mataitoga, who says that:

Capacity development in the area of international trade law, international economic and public international law must now be a priority area for all developing country Members of the WTO, if they are to have a fighting chance of protecting their rights under the multilateral trading system,⁴⁹

and Qureshi, who thinks that the participation of developing countries in the DSB process is indispensable in the obtaining of fairness in procedural justice in the WTO:

Procedural justice relates to fairness in terms of participation in the dispute settlement system at all levels and forms, including particularly the consultation, Panel, and Appellate processes. This involves, for example, the need to sanitize the consultation process from possible external linkages; the need to strengthen

⁴⁷ Ibid., p. 321.

⁴⁸ UNCTAD/EDM/Misc.232/Add.17, (2003). Available online at http://www.unctad.org/en/docs/edmmisc232add17_en.pdf#search='Module%203.2%20in%20this%20Course%20deals%20with%20the%20panel%20

⁴⁹ Mataitoga, Isikeli 'The World Trade Organisation [WTO] Dispute Settlement Mechanism: a Developing Country Perspective', available online at <http://documents.ag.gov.fj/wtoDisputeResolution-mataitoga.pdf>.

third party rights; being able to join as a co-respondent; and generally ensuring that all parties have similar rights of participation.⁵⁰

Albashar and Maniruzzaman ground their case that participation as third parties in the DSM has distinct advantages for developing countries, and for the credibility of the DSB generally, on the above-cited views and others. In summary of the advantages for developing countries, they say:

The advantage for developing countries acting as third parties is that allowing them to access all the stages of the panel, including the interim review process, would give them first-hand experience of the function of the DSM step-by-step, without their being restricted to a certain aspect of the panel procedure.⁵¹

Still better advantage exists in the fact that, as participating third parties, developing countries can be instrumental in the shaping of DSB policy, which, it is sometimes said, exceeds its DSU mandate to make law rather than merely implement it. A complaint of developing countries is that they are excluded from this law-making activity. Third-party participation can rectify this exclusion. Albashar and Maniruzzaman rate the contribution as third parties of Benin and Chad in the *Upland Cotton*⁵² case very highly, noting that these states:

... realized that the WTO dispute settlement system could be used as an effective tool to impose a trade-related agenda. They went through both the legal channel (represented in the DSM by being third parties) and the political channel, by putting the issue on the trade talk agenda, which was one of the main reasons behind the failure of the Cancun ministerial conference in 2003, making their views known to the public and to decision-makers.⁵⁰ This use of the WTO dispute settlement system gave West Africa a stronger political position in the trade negotiations with regard to cotton subsidies, which was one of their key demands. In addition, as regards the political channel, they brought strong and

⁵⁰ Qureshi, Asif H, 'Participation of Developing Countries in the WTO Dispute Settlement System', vol. 47, no. 2, *Journal of African Law*, 2003, p. 174.

⁵¹ Albashar and Maniruzzaman, note 46, p. 357.

⁵² *United States – Subsidies on Upland Cotton*, panel report, WT/DS267/R, 8 September 2004; Appellate Body report, WT/DS267/AB/R, 03 March 2005.

convincing arguments against the US cotton subsidies, which were considered vital elements in the winning of the case.⁵³

These authors demonstrate that there is broad agreement among WTO member states on the shape that reform of the DSU rules regarding third-party participation should take. The proposal for reform that attracted most members' interest was put forward by Costa Rica. This member proposed that 'third parties (i) ought to have access to all proceedings, hearings and information provided to the panel and the AB by the parties or third parties involved in a dispute;' (ii) 'ought to have a right to intervene in the appeal process even if they had not participated in the panel stage', and (iii) should have access to the interim review stage'.⁵⁴ The authors note that some of the members who participated in the discussion of the Costa Rican proposal 'fully agreed with the proposal. Others agreed in the main whilst holding some reservations', and only Australia 'raised strong concerns about the enhancement of third party rights'.⁵⁵

These authors' analysis of the nature of third-party participation in the DSB is interesting particularly for their demonstration that the DSB is not hostile to developing countries' participation, but its implementation of DSU rules regarding third-party participation, and the rules it devises itself, both at panel and appeal stage, is uneven. The authors identify the *EC-Bananas*⁵⁶ case as a 'a landmark dispute in WTO jurisprudence and the evolution of third party rights:' 'landmark' because:

⁵³ Albashar and Maniruzzaman, note 46, p. 319.

⁵⁴ Ibid., pp. 313 – 314.

⁵⁵ Ibid. p. 315.

⁵⁶ *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, panel report, WT/DS27/ECU, adopted on 22 May 1997; appellate body report, WT/DS27/AB/R, adopted on 5 September

The panel accepted the request for an extension of third party rights and allowed members of governments of third parties to observe the second substantive meeting of the panel with the parties. The panel also envisaged that observers would have the opportunity to make a brief statement at a suitable moment during the second meeting.⁵⁷

Nevertheless, developing countries did not gain better third-party rights with this case, for they were not allowed to participate in it after the ‘after the second substantive meeting of the panel’, and ‘their participation in the interim stage was declined’, despite their ‘very significant economic interest in the case’.⁵⁸ *EC–Sugar*⁵⁹ enhanced third-party rights ‘by allowing developing countries who were third parties to review the descriptive draft of the interim stage. This was declined in the *Banana* dispute.’⁶⁰ Third-party rights for developing countries were the most enhanced in *EC – Trade Preferences*,⁶¹ ‘but the Panel in *Sugar*’ granted them even fewer procedural rights’ than they were allowed ‘in the *Banana III* dispute’.⁶² The authors note the legal uncertainty that this history of case law uncovers, and recommend its legal correction.

Very gratifyingly, Albashar and Maniruzzaman raise the cost question, too. It is well and good to point out ways of enhancing developing countries’ DSB presence, but it must be kept in mind that those ways can be adopted only by countries that can afford them.

While it is true that third-party participation is less costly than participation as a

⁵⁷ Albashar and Maniruzzaman, note 46, pp. 332 - 333.

⁵⁸ *Ibid.*, pp. 333-334.

⁵⁹ *EC Sugar, EC – Export Subsidies on Sugar, panel report (complaint by Thailand, Brazil and Australia)*, WT/DS/283/R, WT/DS266/R, WT/DS265/R, 15 October 2004; Appellate Body report, WT/DS/283/AB/R, WT/DS266/AB/R, WT/DS265/AB/R, 28 April 2005

⁶⁰ Albashar and Maniruzzaman, note 46, p. 336.

⁶¹ *EC – Tariff Preferences*, Panel Report, WT/DS246/R 1 December 2003; Appellate Body, WT/DS246/AB/R, 20 September 2004.

⁶² Albashar and Maniruzzaman, note 46, p. 337.

complainant or respondent, it is also true that it is not cost free. Therefore, these authors make the following pragmatic recommendation:

Although participating as a third party means that considerably fewer resources are needed than if participating as a disputing party, it is not totally cost free. It raises a legitimate concern about how to improve the resources available for developing countries so that they can effectively participate as third parties in the DSM.²⁸⁹ In this regard, one could also propose that Article 27.2 of the DSU should provide legal assistance from the WTO secretariat for developing countries to act not only as complainants or respondents, but also as third parties.⁶³

Even if the third-party-participation issue is resolved, the severe problem of enforcing DSB decisions remains for developing countries. Although the DSM is generally considered to have a much more effective enforcement system than the GATT's, the fact remains that it is nevertheless weak: a ruling in favour of a country gives that country the ability to retaliate against its opponent. However, when the opponent is a developed country, there is very little that a developing country can do. Even if it retaliates by imposing high tariffs on imports from the wealthier infringing state, the overall impact on the infringing state will probably be too insignificant to force an end to its violation.⁶⁴ The winning party has to spend considerably on public relations efforts to compel the opponent to comply.⁶⁵

The appeal process of the system almost certainly leads to significant delays that may extend the case for several years. The *US–Upland Cotton* case is witness to this. In this case, Chad and Benin benefited from the significant help of Brazil. This help had financial, technical and knowledge-based forms, for Brazil wished to boost its case by

⁶³ Ibid. p.358.

⁶⁴ Bown, Chad P et al. note 40, p.198.

⁶⁵ Butler and Hauser, note 37, p. 505.

helping the third parties prove theirs. Even more importantly, they had the technical legal support of a private law firm, White and Case, on pro bono basis.⁶⁶ The participation of private attorneys, private law firms and NGOs on the side of the least-developed countries in initiating litigation against violators through the DSM is an important step toward enabling these countries to file more complaints in the future. However, so far, few law firms and NGOs have expressed interest in such initiatives.⁶⁷

The Appellate Body (AB) has the power to suggest the manner in which the losing party might implement the recommendations, but the legal force of its suggestions is uncertain. AB suggestions are binding only with regard to decisions confirming violation. In the event that a defendant observes silence after an AB or Panel decision, and if the parties have not reached agreement on the rectification of the violation after twenty days of the expiration of a ‘reasonable period of time’, the plaintiff can petition the DSB to annul concessions. For instance, in the *EC Bananas* case, at the request of Ecuador, the Panel was reconvened on the basis that the EC implementation was in conflict with the Panel’s ruling. Ecuador requested the Panel to advance explicit suggestions and recommendations as to how the EC might bring its system of importation of bananas into compliance with WTO rules.⁶⁸

The problem remains that developing countries often lack the economic and political will to pursue the implementation of rulings in their favour, especially if the ruling is against a major economic power such as the US. The *US–Upland Cotton* dispute between Brazil

⁶⁶ Zunckel, note 39, p. 130.

⁶⁷ Bown et al. note 40, p. 196.

⁶⁸ Recourse to Article 21.5 of the DSU by Ecuador: Request for the Establishment of a Panel, WT/DS27/80, 26 February 2007.

and the US ameliorates only certain aspects of this problem: Should the US decline to comply with the DSB's decision, Hagstrom opines, Brazil is more than likely to find itself unable to force US compliance.⁶⁹ He is right, of course, or would have been, but for the fact that Brazil proceeded to obtain DSB authorisation for countermeasures under Article 22.2 of the Dispute Settlement Understanding⁷⁰ (DSU), and can now cross-retaliate against US trade by suspending its obligations under the TRIPs and GATS. This is likely to enable it to 'make free' with US pharmaceutical patents. The consequence of this would so dire for the US-based pharmaceutical companies that the US is unlikely to tolerate it. A press article⁷¹ that reported Brazil's request, on 26 August 2008, for the resumption of arbitration in the matter of countermeasures made that much very clear.

The DSB has little case history that fleshes out the DSU provision for cross-retaliation. It has only twice authorised cross-retaliation that allows the suspension of certain TRIPs and GATS obligations: In the *EC–Bananas* case,⁷² Ecuador was authorised⁷³ to put that suspension into practice against the EC. (Antigua was so authorised⁷⁴ in the *US–Gambling* case.⁷⁵) Rather than act upon this authority, Ecuador chose to settle with the

⁶⁹ Hagstrom, J, 'Cotton council picks fight with WTO over March meeting', *Congress Daily*, 22 February 2007, p.6.

⁷⁰ Annex 2 of the WTO Agreement, Understanding on Rules and Procedures Governing the Settlement of Disputes.

⁷¹ Klapper, Bradley S, 'Brazil seeks \$4 billion in WTO sanctions on US', *Associated Press*, 26 August 2008.

⁷² *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, (Panel) WT/DS27/RW/USA, 12 April 1999.

⁷³ Decision by the Arbitrators, *European Communities – regime for the Importation, sale and Distribution of Bananas, Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*, WT/DS27/ARB/ECU, 24 March 2000.

⁷⁴ Decision by the Arbitrators, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/ARB, 21 December 2007.

⁷⁵ Ibid. WT/DS285/R, 7 April 2005.

EC, despite having filed for the establishment of a second panel in February 2007,⁷⁶ to seek redress against EC non-compliance. Antigua as yet has no domestic legislation in place to indicate how it means to use the DSB authority to retaliate. Whether Brazil would obtain DSB authority for cross-retaliation was long uncertain. As late as 2008, Karen Halverson Cross predicted that it would not:

The DSB has authorized cross-retaliation before for two small countries, but the DSU only provides for cross-retaliation where suspending concessions with respect to the sector at issue (here, all goods) is not ‘practicable or effective’. Given the size of Brazil’s economy, it will be more difficult for it to demonstrate that suspending concessions on imports of goods from the United States is not ‘practicable or effective’.⁷⁷

However, at its meeting on 19 November 2009, the DSB *did* authorise Brazil to suspend the application to the United States of concessions or other obligations. On March 2010, Brazil notified the DSB that it would ‘suspend the application to the United States of concessions or other obligations’ under the GATT 1994 in the form of increased import duties’, and under the TRIPS Agreement and/or the GATS, the form of the latter to be notified before implementation.⁷⁸ This is a very interesting, and to many, an unexpected, development.

Article 22.3 of the DSU provides that authorised retaliation must occur in the area of the WTO Agreement that the non-compliant member is violating. It is only when it is not ‘practicable or effective’ (i.e. the retaliation will not hurt the non-compliant member’s

⁷⁶ Ibid. WT/DS27/80, 26 February 2007.

⁷⁷ Halverson Cross, Karen, ‘WTO Appellate Body Upholds Compliance Panel's Findings in *Cotton Subsidies* Dispute’, vol. 12, issue 19, *International Economic Law*, 2008.

⁷⁸ WTO, Summary of the Dispute to Date, ‘Authorization to retaliate granted on 19 November 2009’, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm.

economy sufficiently to persuade it to become compliant, or it will hurt the retaliating member's economy) to confine retaliation thus that cross-retaliation (retaliation in the area of another WTO Agreement under which the dispute arose) can occur, provided that the non-compliant member's violation is 'serious' enough to merit it.

The values 'practicable or effective' and 'serious' are flexible values. It was therefore thought likely that the DSB would bend them in the favour of the US, not of Brazil, for reason alone that authority to Brazil to cross-retaliate by suspending its TRIPs obligations to the US would expose the US pharmaceutical industry. But the DSB did no such 'bending'. So, for the first time in WTO history, that the DSB is not only contributing to the enforcement of WTO member-country compliance, but it is also threatening the US-based pharmaceutical industry, a huge multinational enterprise (MNE).

That threat is certainly there, for Brazil's suspending of TRIPs obligations to protect US patents and copyright is quite unlike, for instance, Antigua's suspending of those obligations: Brazil has a sophisticated pharmaceutical industry; Antigua has none. Had the DSB decided against authorising Brazil's cross-retaliation, it would have given the clear impression that the non-compliance option is freely available to WTO member countries with strong economies bolstered by the power of large MNEs, and that it will not allow the DSU's cross-retaliation provision to be activated against such a member. Had the DSB not allowed Brazil's cross-retaliation, it would certainly have discredited itself.

It would have discredited itself for this reason: A group of least-developed countries attempted to obtain exemption⁷⁹ from the requirements of some agreements, especially those of the TRIPs.⁸⁰ Their request was refused. Exemption would have enabled them to avoid the burden of building a compliance infrastructure that they have neither the expertise nor the means to build. A the *de facto* exemption of the US from compliance, which would have been effected had the DSB not allowed Brazil's cross-retaliation, would have been deeply resented, especially by developing countries. (Discussion of this aspect of the *Upland Cotton* decision will resume briefly at 6.4.3 of this thesis.)

Although the primary objective of the dispute settlement process is to resolve conflicts, the objective of all countries joining the WTO is to promote trade. Thus, the WTO is a forum for agreement rather than a forum for disputes, and the DSM is only its last-resort when agreement fails. Member states at the WTO do not comply with WTO rules because they have to or because it is a legal obligation to do so, but rather, because they all have an interest in the effective development and success of the WTO. As Alvarez puts it:

States have largely complied with trade rules because they have made a considerable tangible and intangible investment in the Organization and because the staff of international organizations, national trade, bureaucracies, and the business clients they respond to all exchange information that makes it easier to patrol compliance.⁸¹

⁷⁹ Communication from Antigua and Barbuda, Barbados, Cuba, Dominica, Fiji, Grenada, Jamaica, Mauritius, Papua New Guinea, Solomon Islands, St. Kitts and Nevis, St. Vincent and the Grenadines, WT/COMTD/SE/W/17, 18 October 2005 paras 3 and 4.

⁸⁰ Stokes, B, 'US, Europe strive to address developing world's concerns', *Congress Daily*, 13 December 2005, pp. 11-12.

⁸¹ Alvarez, note 23.

So even the US, the EU and Japan have an interest in compliance, because they know that if they do not comply, then other states will not comply either, and the entire system will fail. This is a valid argument inasmuch as it is concerned to illustrate the rational use of a global legal framework for the regulation, facilitation and promotion of international trade among nations. However, it does not explain away the non-compliance of developed WTO member countries when they have no fear of retaliation. Comparative data on compliance under the GATT show that full compliance was achieved pursuant to only 40 percent of the rulings, and in 33 percent of cases, no non-compliance of any kind was reported. Partial compliance was the trend in the remaining cases. Little has changed since the WTO DSM framework came into being.⁸²

2.2 Are developing countries' complaints justified?

It is all too evident that many people consider the WTO the villain that perpetuates the misery of some developing and all least-developed countries: Violent demonstrations have for years routinely attended WTO conferences wherever they occur. It is also evident in the light of this that many aver wholeheartedly that developing countries' complaints are fully justified. On quite what criteria this conclusion is reached is, however, rather less evident. An investigation follows of where the necessary criteria might be found.

⁸² Ierley, D, note 13, p. 638.

2.2.1 The facts and their softening

Since the inception of the WTO in 1994 by instrument of the Marrakesh Agreement,⁸³ the globalisation of trade, of which the WTO is the chief instrument, has left behind many countries, and a vast gap exists between the world's poor and rich countries. Franck offers alarming statistics on this point: GDP measure shows that 23 percent of the world's population absorbs 82 percent of the world's wealth, leaving 77 percent to share the remaining 18 percent.⁸⁴ It has been proposed that globalisation denies food to the hungry and arms them with killer weaponry.⁸⁵ Studies reveal that even as globalisation accelerates, poverty rates climb and wages decline.⁸⁶ Studies reveal also that despite the abolition of trade and investment barriers and the flood of capital into foreign markets, about 1.3 million people, which is about 23 percent of the population of the developing world, are living on less than US\$1 of daily income.⁸⁷ Least-developed countries individually account for less than 0.05 percent of the volume of world trade, and collectively for about 1 percent of it.⁸⁸ McKay⁸⁹ has advanced the view that the economic benefits of the WTO are barely felt even by developing countries with comparatively strong economies like China's: that country's economy will not benefit by more than 0.8

⁸³ Marrakech Agreement Establishing the World Trade Organization, signed in Marrakech, Morocco, on 15 April 1994.

⁸⁴ Franck, Thomas M, 1998, *Fairness in International Law and Institutions*, Oxford University Press, pp. 413-414.

⁸⁵ Staples, Steven, 'Ten Ways Globalization Promotes Militarism', The Polaris Institute, 5 September 2003, <http://www.rense.com/general41/prono.htm>.

⁸⁶ Grilli, Enzo, 1994, 'Long Term Growth, Income Distribution and Poverty in Developing Countries: the Evidence', in Grilli, Enzo and Salvatore, Dominick (eds), *Handbook of Economic Development*, Greenwood Publishing Group, pp. 23-45.

⁸⁷ Chen, Shaohua and Ravallion, Martin, 'How have the world's poorest fared since the early 1980s?' *Development Research Group, World Bank WPS3341*, 2004, p.18. http://www-wds.worldbank.org/external/default/WDSCContentServer/IW3P/IB/2004/07/22/000112742_20040722172047/Rendered/PDF/wps3341.pdf.

⁸⁸ Smith, Ransford, 'Size matters', issue 3, *World Trade Review*, 2004, p. 442

⁸⁹ McKay, E, 'Poorest nations hit hardest by WTO agenda, study finds', *Global Information Network*, 16 March 2006.

percent to 1.2 of GDP growth, while the much weaker economies of poor regions, such as the sub-Sahara's, are expected to witness a contraction of -1 percent.

Paul Kruger, however, argues that the WTO's globalisation of trade has an upside, too.⁹⁰ He concedes that the gap between the richest and poorest nations has never been wider, but points out that the circle of advanced industrialised nations has expanded in the past twenty-five years. To substantiate this, he posits the case of South Korea, now an important industrial nation, but a near-subsistence economy until as recently as the 1960s. He concedes also that the rich-poor gap is now wider also within industrialised countries, in fact, wider than it has been since the 1920s. But he is reluctant to attribute this to imports of labour-intensive products that have reduced the demand in developed states for unskilled labour, preferring instead to attribute it to developments in technology and social change. The latter two factors are not available, he again concedes, to explain the widened gap between rich and poor in developing countries. That, for him, is a 'puzzle', but still not a condemnation of globalisation.

Kruger argues further that a major criticism of globalisation, the exploitation of the cheap labour in least-developed countries by multinational enterprises (MNEs), is not a valid criticism, for underpaid though people are by them, MNEs are still their best chance of a means of livelihood. Indeed, an inadequate income is better than no income, and making goods for MNEs is better than scavenging on rubbish dumps or ringing out a subsistence-farmer income from a too-small plot of land. This thesis writer is bemused by Krugman's

⁹⁰ Krugman, Paul, 2008, *The Return of Depression Economics and the Crisis of 2008*, (2nd ed.) Penguin Group, pp. 24 -28.

defence of globalisation in these terms. Why mount a defence at all, if it amounts to no more than this trivial one?

2.2.2 The democracy deficit

Though the WTO has been called a democratic institution, the reality is that it is dominated by the advanced industrialised nations and their powerful MNEs. Least-developed countries have little voice in the WTO framework. This was all but acknowledged without apology when the EU's richest countries and the US closeted themselves in London (under the chairmanship of Peter Mandelson, then the European Trade Commissioner) with India and Brazil⁹¹ to hammer out an agreement that had been obstructed by a coalition of least-developed countries and the most developed of developing countries, China, Brazil and India, during the then-most-recent round (Hong Kong, December 2005) of Doha talks. Given such a event, it is obvious that developing countries are at a political disadvantage in negotiating market access,⁹² albeit true that it is not the WTO *per se* that puts them at structural disadvantage, but rather, the power politics that steer the ministerial meetings at which WTO agreements are drafted and concluded.

But was a covert structural disadvantage imposed upon the developing-country WTO members? If there was, then the legal framework of the WTO is no more than a set of agreements between two sides with completely different interests: Shadlen opines that the developed countries' main interests were to promote efficiency in global trade, reduce the

⁹¹ Stewart, Heather, 'Secret talks to save trade deal: Campaigners and developing countries say poor are being ignored as six powerful WTO members plan closed-door sessions', *The Observer*, 5 March 2006.

⁹² Mattoo, Aaditya, and Subramanian, Arvind, 'The WTO and the poorest countries: the stark reality', IMF Working Paper, WP/04/81, 2004, p 6.

cost of monitoring trade agreements, and to enforce collective agreements. The ambition of developing countries rose to nothing more specific than to ‘ameliorate some of the vulnerability that marks developing countries’ positions in the international system’.⁹³ The clarity of purpose of the developed countries, and their attendant intention to forge ahead, was no context inclined to hone target-specific objectives for the benefit of developing, let alone least-developed, countries.

2.2.3 The views of political commentators

Commentators who contribute in a political vein to the argument about whether developing countries’ complaints are justified tend to take either the line that the WTO is remiss for inhibiting the trade capacity of developing and least-developed economies, or that this body is good all round for everybody. Unlike the typical supporters and detractors, Paul Collier’s popular work⁹⁴ leaves out the WTO as either villain or hero. He attributes the lamentable condition of least-developed countries to quite other factors. These countries, some 58 of them (not named by Collier), concentrated mainly in Africa and Central Asia, are characterised by low *per capita* income levels and weak *per capita* GDP growth, and they are subject to one, all or some of four ‘traps’:⁹⁵ the ‘conflict trap’ of civil or internecine wars;⁹⁶ the natural resources trap (‘about 29 percent of the people in the bottom billion live in countries in which resource wealth dominates the

⁹³ Shadlen, Kenneth C. ‘Latin American Trade and Development in the New International Economy’, *Latin American Research Review*, vol. 41, no 3, 2006, p.81.

⁹⁴ Collier, Paul, 2007, *The Bottom Billion: Why the poorest countries are failing and what can be done about it*, Oxford University Press.

⁹⁵ Ibid. pp. 5-12.

⁹⁶ Ibid. p.. 20.

economy'⁹⁷); the bad-governance trap ('terrible governance and policies can destroy an economy with alarming speed'⁹⁸); and the 'landlocked-with-bad-neighbours' trap.⁹⁹

Having identified the causes of economic marginalisation, Collier makes numerous recommendations for how G8 nations might help. The WTO itself, Collier appears to think, can help.¹⁰⁰ That is, it can do something other than facilitate 'reciprocal bargains', for the bottom billion 'have nothing to bargain with'. He suggests a WTO component such as the World Bank's International Development Association,¹⁰¹ a body that would devote itself to persuading rich countries to give charitable trade concession to the bottom-billion-people countries. This, he says, 'would put pressure on the bottom billion to facilitate the bargaining process rather than wreck it'.¹⁰² He had noted previously that bottom-billion countries' trade barriers are a self-imposed problem, for:

Their own individual markets are tiny and stagnant, so focusing on the domestic market, which is all that protection can achieve, is going to get nowhere.¹⁰³

Sympathetic though he is to the plight of the bottom billion, Collier is well short of blaming the WTO for it. Not so Mahutga: In an empirical analytical study of the quantitative economic benefits and outcomes of globalisation between 1965 and 2000,¹⁰⁴ he shows that global trade has produced both winners and losers. The winners are the

⁹⁷ Ibid. p. 39.

⁹⁸ Ibid. p. 64.

⁹⁹ Ibid. pp. 55-57.

¹⁰⁰ Ibid. pp. 169 - 172.

¹⁰¹ IDA web site:

<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/IDA/0,menuPK:51235940~pagePK:118644~piPK:51236156~theSitePK:73154,00.html>.

¹⁰² Collier, note 94, p. 172.

¹⁰³ Ibid. p. 160.

¹⁰⁴ Mahutga, MC, 'The Persistence of Structural Inequality? A Network Analysis of International Trade, 1965-2000', vol. 84, no. 4, *Social Forces*, June 2006, p.19.

core developed countries that have successfully asserted their economic dominance throughout the various global shifts that this period has seen. Some semi-peripheral countries, especially those with rapidly growing economies, have also been able to benefit from global commerce. However, most poor countries have either failed to benefit, or have become worse off in comparison with wealthier countries.

Dicken, too, notes that globalisation has generally been unkind to the poorest countries of the world, pointing out that:

[while] the already affluent countries have sustained – even increased – their affluence, [and] some developing countries have made very significant progress..., there is a hard core of exceptionally poor countries that remain stranded ...¹⁰⁵

2.2.4 The ‘inside story’ commentators

‘Inside story’ revelations abound. Their chief concern is to reveal the power politics in WTO negotiations. Chris May, for instance, talks about developing countries having strongly opposed the inclusion of TRIPs and GATS in the Uruguay Round. Yet, after years of rejection and failure, the US and the EU managed to impose a final settlement on the Uruguay Round with a take-it-all or leave-it-all ultimatum to developing countries. Against such pressure, developing countries had no choice but to ‘take it all’, despite the fact that they had long opposed the inclusion of the TRIPs and GATS.¹⁰⁶ This, May surmises, might also explain why, ‘on virtually every issue – e.g., the scope of patentability, the length of patent terms, and the provisions for regulating patents – the

¹⁰⁵ Dicken, Peter, 2004, ‘Globalisation, Production and the (Im)Morality of Uneven Development’, in *Geographies and Moralities: International perspectives on Development, Justice and Place*, Lee, Rodger and Smith, David M. (eds), Blackwell Publishing, p.29.

¹⁰⁶ May, Chris, ‘Capacity Building and the (Re)production of Intellectual Property Rights’, vol. 25, no. 5, *Third World Quarterly*, 2004, p. 822.

developed countries prevailed'. The only concession that the most-developed countries agreed to with respect to TRIPs, for example, was the transitional period, but this was hardly a generous offer, since many developing countries were eventually unable to benefit from it.¹⁰⁷

The US and EU have long known that time is on their side, but not on the side of developing countries eager to join globalisation and benefit from trade liberalisation whenever possible. Thus the failures of the Cancun Round in 2003, the Geneva Round in 2004, the Hong Kong Round in 2005 and the Doha Round in 2006 and again in 2008 were not surprising, since the developed countries were not willing to modify their positions on domestic agriculture subsidies, nor to meet developing countries' expectation of trade concessions, both of which issues were of vital importance to many developing countries.¹⁰⁸

A tough strategy had already been used to effect in the Uruguay Round, where the developing countries had no choice but to accept the unfair legal frameworks of the TRIMs and GATS, as well as their inclusion in the WTO, despite their long opposition to these agreements and to their inclusion. They had no choice because the US and the EU infused these agreements with 'sweeteners' that the developing countries were eager to utilise. Had they not accepted the TRIMs and GATS, the developing countries had nothing else to gain.¹⁰⁹

¹⁰⁷ Ibid.

¹⁰⁸ Mulama, J, 'African leaders say US farm subsidies stifle development', *Global Information Network*, 17 April 2006.

¹⁰⁹ Tarullo, DK, 'The end of the big trade deal', vol. 20, no. 3, *The International Economy*, 2006.

The Doha Round begun in 2001, and was dubbed the ‘Development Round’ for the attempt by some of its negotiators to construct a capacity to deal with issues of concern for developing countries. It collapsed in 2006.¹¹⁰ Under the leadership of Brazil, the Doha Round introduced the Declaration on the TRIPs Agreement and Public Health. The objective of the Declaration was to push for interpretations and implementations of the TRIPs that are more supportive of the rights and interests of developing countries in protecting public health and promoting access to medicines for all. The specific concern of developing countries at the time, and their prime motive for supporting the Declaration, was HIV/AIDS, and the fact that the existing compulsory licensing provision was working against the possibility of the containment of this deadly virus. The developed countries had neither the health problem nor the inclination to reduce the privileges the existing compulsory licensing provision afforded their pharmaceutical industries; consequently, they ensured the failure of the Round.¹¹¹

For WTO supporters, a celebrated outcome of WTO-driven free trade is that:

The proportion of people living in extreme poverty (less than \$1 a day) in developing countries dropped by almost half between 1981 and 2001, from 40 to 21 percent of global population, according to figures released today by the World Bank.¹¹²

This is marred ‘only’ by the fact that ‘the proportion of poor has grown, or fallen only slightly, in many countries in Africa, Latin America and Eastern Europe and Central

¹¹⁰ Siddiqi, M, ‘Crunch time for world trade deal’, no. 324, *African Business*, October 2006.

¹¹¹ Barton, JH, ‘Trips and the Global Pharmaceutical Market’, *Health Affairs*, vol. 23, no. 3, 2004, p.144.

¹¹² Neal, Christopher and Case, Cynthia, ‘Global Poverty Down By Half Since 1981 but Progress Uneven As Economic Growth Eludes Many Countries’, World Bank website, Press Release No:2004/309/S, 23 April 2004, <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20194973~menuPK:34463~pagePK:64003015~piPK:64003012~theSitePK:4607,00.html>.

Asia'.¹¹³ This gave rise to the argument in the WTO supporters' camp that the outcomes of free trade for developing countries will continue to be positive, and that this will boost the economies of least-developed countries by \$142 billion annually.¹¹⁴ Manzella¹¹⁵ argues that global trade-liberalisation gains will range anywhere between \$250 and \$650 billion annually, of which 30 percent to 50 percent will be witnessed in developing countries. Furthermore, global economic welfare is expected to grow by \$128 billion, of which \$30 billion will be witnessed in developing countries. The 'only' problem, on Manzella's view, is that some developing countries cannot join in:

For many of the world's poorest countries, the primary problem is not too much globalization, but their inability to participate in it. These conditions entirely reverse the normative thrust of the [WTO] policy away from the benefits to the developing country and towards the effects on the developed country'.¹¹⁶

The problem, as Manzella's somewhat frugal logic has it, is the incompetent countries. But for their incompetence, we would be looking forward to a better world. A black humour pervades this line of reasoning, whether or not its purveyor is aware of it.

One might add the point to the WTO-supporter camp that, but for the existence of the WTO, Brazil would not have been able to protect the cotton industries of Benin and Chad, nor its own, against US protectionism. As it is, the comparatively weak Brazil was able to assert its WTO-conferred right to challenge US non-compliance by bringing a successful case before the DSB against that much stronger economy.

¹¹³ Ibid.

¹¹⁴ Schwab, S. 'More trade, less poverty', *Wall Street Journal*, 29 June 2006.

¹¹⁵ Manzella, JL, 'Have Trade and Globalization Harmed Developing Countries?', *World Trade*, 5 January 2006, <http://www.worldtrademag.com/Articles/Column/7f24a880cfc98010VgnVCM100000f932a8c0> _____

¹¹⁶ Ibid.

2.3 Fertile and infertile theoretical perspectives

It goes without saying that the ‘all over the place’ finger-pointing outlined above will not decide whether developing countries’ complaints about the WTO are justifiable. At best, it attests that there are such complaints, and that some people but not others are inclined to deny their validity. Besides, a competing list of WTO virtues can be drawn up to contest it, as it was indicated above. What is needed is a normative principle on which WTO might be evaluated for its capacity to deliver fairness of outcome for all member states.

2.3.1 Patterson and Afilalo

Patterson and Afilalo contribute nothing to this end. They recommend the scrapping in entirety of the WTO.¹¹⁷ There is therefore no concern in their work to identify WTO shortcomings, nor is there any look in the direction of the moral and ethical validity of international trade law. Instead, they develop a theory on which the GATT, a creature of the twentieth century ‘constitutional moment’ that produced the Bretton Woods international economic order, is declared anachronistic and due for annihilation by a new ‘constitutional moment’ that would be the enabler of ‘global economic opportunity’ in the twenty-first century. The authors reason that the statecraft that accommodated Bretton Woods in the twentieth century is no longer the same statecraft, because the modern state has evolved beyond the nation-state entity. That is, the GATT’s ‘wholesale adoption of comparative advantage as one of the foundational norms of the system’ has to be replaced by ‘a new trade norm for states, which we identify as an enablement of global economic

¹¹⁷ Patterson, Dennis, and Afilalo, Ari, 2008, *The New Global Trading Order: The Evolving State and the Future of Trade*, Cambridge University Press.

opportunity'.¹¹⁸ That 'enablement of global economic opportunity' should become 'the new foundational norm for the system', and that norm should be actuated by:

... diffuse, interconnected institutional frameworks, charged with implementing discrete projects rather than comprehensively achieving a goal such as comparative advantage, and operating outside of the one-state, one-vote model of the modern world ...¹¹⁹

These authors claim that they do not advocate a 'comprehensive global economic government charged with charting out a universal course of action to achieve a stated goal', but instead:

... a post-modern institutional framework that will work together with states and industry representatives to manage the enablement of global economic opportunity throughout the globe on a discrete, issue-driven basis.¹²⁰

This new trade organisation, the Trade Council, 'should be comprised of a shifting representation of states and their governments depending on the industries at issue', and it should 'establish programs designed to create the conditions necessary for enablement of global economic opportunity'.¹²¹

The basic weakness of these authors' position is in their assumption of the *desirability* of the erosion of state power in international law, and of the replacement of it by a pre-dominance of non-state entities, particularly industries. Arguably, that dominance is already there, albeit through the formal agency of states. That, more than anything else, accounts for the patent and copyright protection provisions of the TRIPs. Also, have these authors established that non-state-player influence on any matter of international

¹¹⁸ Ibid. pp.117- 124.

¹¹⁹ Ibid. p. 153.

¹²⁰ Ibid. p. 184.

¹²¹ Ibid. p. 185.

law has to be accommodated by states (in the twentieth-century sense of ‘state’)? It seems that any such obligation obtains only in the envisioned world that has been changed by their hoped-for ‘cataclysmic event’ that destroys the power of states. The world in which we live is one in which national sovereignty is still a significant force, one not inclined to cede its power to non-state entities.

Furthermore, any line of thought that concludes in a recommendation that the WTO be scrapped and replaced by another regulating body should at least consider the possibility of no replacing-body at all. After all, must one concede that international trade *has* to be regulated by a purpose-erected body? The inadequacies of both the GATT and the WTO system of agreements strongly suggest the contrary. Besides, these authors’ ‘new foundational norm’: the ‘enablement of global economic opportunity’, has the hollow ring of a rhetoric with which we are all too familiar in WTO discourse. These authors perpetuate the counter-intuitive proposition that ‘opportunity’ is somehow ‘in’ an infrastructure, and that it is up to the actors in that infrastructure to find them. And their insertion of the ‘enablement’ concept here is odd: lexicographically, ‘opportunity’ is itself precisely because it is random. A concept of the enablement of the random is nothing short of linguistic nonsense.

2.3.2 Garcia

Considerations of fairness and justice move closer to the legal scrutiny of the WTO, for law is inextricable from those concepts. A valuable contribution to this approach to evaluating the extent to which WTO law accommodates developing countries is Frank

Garcia's. His admirable essay¹²² takes considerable pains to outline a moral philosophy of justice in international trade. Had he so chosen, Garcia might have proposed that this philosophy should underpin the legal principles by which the WTO lives. Somewhat disappointingly, however, he limits his proposition to a recommendation that the US practise distributive justice in its trade relations with the developing world.¹²³ (The concept 'distributive justice' will be discussed later in this section with reference to Pogge.) Explicit in this recommendation is that Garcia thinks that the US is not presently behaving consistently with those demands.

At once the strength and weakness of the philosophy of justice Garcia propounds is that he situates it in a discursive context in which he prefers the position of Rawls¹²⁴ above that of Nozick:¹²⁵ 'strength' in that a moral discourse is properly drawn from a well-discussed proposition and its counter-proposition, and 'weakness' in that his adoption of one proposition and rejection of the other necessarily turns on moral preference, given that moral proof is unattainable. Garcia's moral position is therefore at best justifiable. It can even be considered compelling, but it cannot, *qua* moral position, be considered incontrovertible. Of course, Garcia is fully aware of this:

*If the developed world's economic relationship to the developing world is in fact governed by moral obligation, [italics added] and not simply by the instrumental calculations of the moment, then there must be a normative framework within which to articulate the implications of this inequality [i.e. the distribution of resources].*¹²⁶

¹²² Garcia, Frank J, 'Trade and Inequality: Economic Justice and the Developing World', vol. 21, *Michigan Journal of International Law*, 1999 - 2000, pp. 975 - 1049.

¹²³ Ibid. p.1036.

¹²⁴ Rawls, John, 1972, *A Theory of Justice*, Harvard University Press.

¹²⁵ Nozick, Robert, 1974, *Anarchy, State and Utopia*, Basic Books and Basil Blackwell.

¹²⁶ Garcia, note 122, p. 980.

The normative framework he proceeds to construct begins with the proposition that:

... the principle of special and differential treatment, a key element of the developing world's trade agenda, plays a central role in satisfying the moral obligations that wealthier states owe poorer states as a matter of distributive justice.¹²⁷

Garcia sees fit at this point to call attention to the fact that his approach is not grounded 'in the discourse of human rights, such as the right to development'.¹²⁸ Instead, he turns to John Rawls's *A Theory of Justice*, deeming it the 'leading contemporary liberal analysis of the problem of equality'.¹²⁹ Garcia's brilliantly succinct account of Rawls's proposition about the relationship of 'fairness' and 'justice' is carried by his 'central moral intuition' that 'the inequality in social primary goods' is 'not deserved', since the possession of those goods is 'deeply influenced by an underlying natural inequality untouchable by categories of moral responsibility and entitlement'. Therefore, Garcia requires:

... that a liberal theory of justice be 'endowment sensitive', in order to capture our intuition that we do not deserve in any meaningful moral sense the advantages or disadvantages that we enjoy as a consequence of the physical and social circumstances of our birth'.¹³⁰

He strives, and succeeds, to give as favourable an account of Nozick's counter-position, developed in *Anarchy, State and Utopia*, as anyone can possibly give it. Quoting Nozick's libertarian (a 'libertarian' position being the antithesis of Rawls's 'egalitarian' one) opening gambit: 'individuals have rights, and there are things no person or group may do to them without violating their rights', Garcia proceeds to tell us that this is a

¹²⁷ Ibid. p. 890.

¹²⁸ Ibid. p. 980.

¹²⁹ Ibid. p. 981.

¹³⁰ Ibid. p. 998.

‘strong Lockean statement of the priority of individual rights’ that ‘leads libertarians like Nozick to approach the problem of distributive justice in negative terms’ (that is, distributive justice cannot impinge upon Nozick’s notion of individual rights). On Nozick’s view, ‘there is no room for the sort of distributive projects Rawls sees as central to the role of the state’.¹³¹

Presumably because he has declared himself unconcerned in this essay with ‘human right to development’ sorts of arguments, Garcia does not delve into what Nozick means by ‘individual rights’. But it is worth noting here that, according to Nozick, not even the right to life is an individual right, for:

... a right to life is not a right to whatever one needs to live; other people may have rights over these other things. At most, a right to life would be a right to have or strive for whatever one needs to live, provided that having it does not violate anyone else's rights.¹³²

In short, there are no Nozickian individual rights other than the right to acquire and hold property.¹³³ And what is more, if property is ‘justly’ acquired (e.g. inherited) and freely traded, distributive justice obtains *ipso facto*, no matter what the resulting inequality of wealth and well-being for people generally or individually.¹³⁴

As already noted, Garcia is as kind as he can be in his account of Nozick’s position. But it is not clear why Nozick features at all, other than as a gainsayer of Rawls, for Garcia does not express the slightest interest in proposing that Nozick has something substantive

¹³¹ Ibid. p. 1008.

¹³² Nozick, note 126, p. 179.

¹³³ Ibid. p. 174.

¹³⁴ Ibid.

to say that somehow weakens Rawls's philosophical position. Perhaps Garcia's Nozick allusion means to do nothing more than suggest that the US position regarding justice and fairness is in spirit Nozickian, and wrongly so. This reading of Garcia is certainly consistent with his legal point that 'WTO agreements as a whole' strive to accommodate 'the principle of special and differential treatment' of developing countries',¹³⁵ and his criticism of US domestic legislation for the fact that its instruments:

... undercut the principle of non-reciprocity by conditioning the preferences [*extended to developing countries*] on assurances by the beneficiary that it will provide the US' market access to commodity resources, and by 'requiring that the beneficiary will not grant preferences to other developed countries which are found to hurt US commerce'.¹³⁶

Given that it is now habitual for WTO Ministerial meetings to fail¹³⁷ upon developing countries' protests that their WTO participation, and their interests generally, are marginalised, it is a little worrying that Garcia is ready to accredit WTO agreements with sensitivity to the principle of special and differential treatment of developing countries. The provisions for them that he cites (see footnote 135, below) are few, and, strictly speaking, they are GATT provisions, the status of which is uncertain in the context of WTO agreements. Specific WTO agreements, such as the one that enabled the expiry of the Multi-Fibre Arrangement in 2005, demonstrate the very opposite of what might be

¹³⁵ Garcia identifies Article XVIII of the GATT as the provision that enables developing countries meeting its criteria 'to take advantage of market protection mechanisms', and Article XI as the provision against quantitative restrictions. He notes also that Part IV, Article XXXVLI(8) exempts developing countries from expecting reciprocity for their 'tariff/NTB reduction commitments to developed countries: Garcia, note 122, p. 993.

¹³⁶ Garcia, note 122, p. 1036.

¹³⁷ The third WTO Ministerial Conference met in Seattle, US in 1999. It collapsed after only four days of fruitless discussion. The fourth WTO Ministerial Conference, which opened in Doha, Qatar, in November 2001, finally collapsed at the end of July, 2006. The 5th WTO Ministerial Conference in Cancun, Mexico, begun in mid-September 2003, collapsed in the same month. The sixth Ministerial Conference in Hong Kong, between 13 to 18 December 2005, reached agreement that the Doha round would be revived. That had not happened by June 2010.

considered a sensitivity to the principle of special and differential treatment. (This point is expounded in Chapter 3.) But this criticism aside, Garcia's core point: the moral justification of the need for distributive justice in the WTO regime, is well made and generally well taken.

2.3.3 Pogge

In this writer's view, the most valuable contribution to the conceptualisation of what a body of law with an international scope must do to pursue the attainment of justice and fairness comes with Pogge's 1994 work.¹³⁸ Pogge declares himself fully in sympathy with Rawls's three principles of *domestic* egalitarian justice as outlined in *A Theory of Justice*:¹³⁹ (i) social institutions must observe political liberties by allowing persons of similar calibre and motivation roughly equal chances of gaining political office and/or influencing political decisions, their wealth and social class notwithstanding; (ii) those equal chances should accrue also to the obtaining of education and professional position; (iii) to observe these principles, social institutions must be designed to confer maximum benefit on the least socially and economically privileged.¹⁴⁰ (The third stipulation is the core of Rawls's 'difference' principle.) However, Pogge faults Rawls for elaborating 'no egalitarian distributive principle of any sort' in the global arena (in his discourse on the subject)¹⁴¹ that would satisfy his own demand that 'a plausible concept of global justice must be sensitive to international social and economic inequalities'.¹⁴² Pogge is

¹³⁸ Pogge, Thomas W, 'Egalitarian Law of Peoples', vol. 23, no. 3, *Philosophy and Public Affairs*, 1994, pp. 195-224.

¹³⁹ Rawls, note 124, p.51.

¹⁴⁰ Pogge, note 138, pp-195-196.

¹⁴¹ Rawls, J, 1993, 'The Law of Peoples', in *On Human Rights*, Shute and Hurley (eds), Basic Books, pp. 41-82 and 220-230.

¹⁴² Pogge, note 138, p. 196.

uncomfortable also with Rawls's concession that 'a just world order can contain societies that differ from his own' is qualified by his the prescription that we demand of those different societies that 'their institutions secure human rights'.¹⁴³ Pogge is not sure that the concept of justice that sits well in the domestic law of some societies, particularly, a concept of justice of which the individual's need is the ultimate object, can be transported into the international context. He says:

Liberal concepts of justice may differ from Rawls's by being comprehensive rather than political ... or by lacking some or all of the three egalitarian components he incorporates.¹⁴⁴

Rawls does not recognise this, to Pogge's consternation. He quotes Rawls's assertion that:

There should be certain provisions for mutual assistance between peoples in times of drought, and, were it feasible, as it should be, provisions for ensuring that in all reasonably developed liberal societies people's basic needs are met,

then asks incredulously: 'Does he really mean ... that provisions are called for to meet the basic needs only in reasonably developed societies?'¹⁴⁵ It then further disconcerts Pogge that Rawls will not let his 'difference' principle into the international domain in the way that it exists in the domestic domain: Rawls holds instead that this principle 'demands too much from hierarchical societies'. So Rawls's difference principle in the international context takes a new form, to become 'a principle of *redistribution*',¹⁴⁶ and is no longer the necessary ingredient of egalitarian justice that it is in the domestic context.

¹⁴³ Ibid. pp. 196-197.

¹⁴⁴ Ibid. p. 207.

¹⁴⁵ Ibid. p. 209.

¹⁴⁶ Ibid. p. 209.

Turning this one and only time to Nozick, Pogge explains that: ‘Nozick wants to make it appear that laissez-faire institutions are natural and define the baseline distribution’.

Rawls calls a revision of this ‘redistributive transfers’. Nozick thinks the latter demands too much from the well endowed; Rawls thinks that the ‘differences’ principle in the international domain ‘demands too much from hierarchical societies’. Pogge points out that ‘Rawls’s presentation of the issue is the analogue to Nozick’s in the domestic case’.¹⁴⁷ This is indeed severe condemnation. Yet Rawls deserves it. He did not deliver to the international context the egalitarian justice inherent in the ‘difference’ principle that he delivered to the domestic context.

Pogge’s case rests on the premise that ‘a plausible conception of global justice must be sensitive to international social and economic inequalities’,¹⁴⁸ and that therefore an egalitarian distributive principle of some sort must become operative in the international context. Rawls proposes a consumption tax as the means by which ‘a property-owning democracy might satisfy the difference principle’. Pogge makes the same proposal for the international context. In that context, it is resource ownership that is to be the source of the tax: ‘while each people owns and fully controls all resources within its national territory, it must pay a tax on any resources it extracts’, those resources being oil reserves, agricultural land, *etc.* The ‘difference’ principle, however, is not redistributive, but distributive, because the tax burden is not borne by the owners of resources alone. Buyers of extracted resources pay more for those resources when the owner-extractors are taxed. There is therefore a distribution, not a redistribution, in the application of the

¹⁴⁷ Ibid. p. 212.

¹⁴⁸ Ibid. p.196.

‘difference’ principle. This, then, is distributive justice, the answer in the international context to egalitarian justice in the domestic context.¹⁴⁹ In the present thesis writer’s view, Pogge’s moral position does not admit criticism. But it does have an implementation problem. This point will be taken up in Chapter 3.

2.4 The WTO regime and fairness/justice

Several prominent theorists visit the Rawls/Garcia/Pogge positions in their WTO-related discourses. Franck, for instance, talks of procedural legitimacy and distributive justice, positing that these are the two axiomatic values that properly direct international law agreements. He says of trade liberalisation that it is ‘the rubric under which the tension between substantive distributive justice and procedural right process is discursively managed’.¹⁵⁰ This is his normative framework for evaluating the fairness of the WTO procedures that achieved its Agreements, and the level of justice in their substance and outcomes. Narlikar, on the other hand, denies the presence in the WTO scheme of any consideration of fairness or justice. There is instead, she argues, a neo-liberal institutionalism that has been the dominant philosophy that generated the WTO and its agreements.¹⁵¹ Neo-liberal institutionalism promotes the formation of global institutions, organisations and networks that take collective and cooperative action with the prime objective of achieving efficiency. The construct ‘efficiency’ is, in the theoretical scheme of neo-liberal institutionalism, confined to concerns with cost containment in the pursuit of outcomes; this construct does not engage moral concepts like fairness and justice. It is

¹⁴⁹ Ibid. pp. 199-201.

¹⁵⁰ Franck, note 84, p. 26.

¹⁵¹ Narlikar, note 9.

for this reason that every new round of WTO negotiations draws thousands of protestors all over the world under the banner of fairness and justice.¹⁵²

Although WTO spokespersons regularly assert that fairness is a core value of the WTO, Narlikar accuses that ‘fairness’ in WTO advocates’ usage is limited to issues in procedural equality. That equality, she argues, is the thrusting of equal status on entities not able to occupy that status: Procedural fairness obtains when rules apply equally to all players. But it is not a fairness that even approaches ‘outcome-related fairness’ in kind. Thus, the fact that a country with an economy as small as Panama’s enjoys equal rights and obligations in the WTO legal framework with the US does not amount to fairness. On the contrary, procedural equal rights all but inevitably result in outcomes that favour the affluent developed state.¹⁵³

Narlikar’s position is well vindicated by the decision of the Panel in the *EC–Bed Linen* case.¹⁵⁴ There was an opportunity here for the DSB to anticipate the Doha Ministerial Decision of 2001 that undertook to ensure that the WTO system ‘responds fully to the needs and interests of all participants’,¹⁵⁵ by invoking the provision of Article 15 of the Antidumping Agreement¹⁵⁶ for a ‘constructive remedies’ solution when ‘the essential interests of developing country members would be affected’, and by preferring that

¹⁵² Ibid.

¹⁵³ Ibid. p.1019.

¹⁵⁴ *European Communities—Antidumping Duties On Imports of Cotton-Type Bed Linen From India*, Report of the Panel, WT/DS141/R, 30 October, 2000.

¹⁵⁵ Preamble, ‘Doha WTO Ministerial Decision on Implementation-Related Issues and Concerns’, WTO Ministerial Conference, Implementation-Related Issues and Concerns, Nov. 9–14, 2001, WT/ MIN(01)/17.

¹⁵⁶ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

solution to the US's imposing of antidumping duties.¹⁵⁷ India argued that the leading sentence of Article 51: 'It is recognized that special regard must be given by developed country members', imposed an obligation that the US take into account India's status as a developing country, and on that basis, to refrain from imposing antidumping measures, for that would be to adversely affect India's interests.¹⁵⁸ Despite this apparently peremptory ('must be given') text of Article 51, the Appellate Body deemed that no outcome is stipulated by it, but rather, it imposes an obligation on developed country to 'actively undertake an exploration of possibilities with a willingness to reach a positive outcome'.¹⁵⁹ So that which looked like a provision that seeks outcome-related justice turned out by interpretation to be merely procedural justice.

It is sometimes argued that, ironically, the developing countries themselves may have had a hand in elevating procedural fairness above outcome-related fairness. When the first round of negotiations began in the 1940s, developing countries were interested in guarding their economies, sovereignty and independence against intrusion by outside powers. This may have enabled the 'equal obligations and rights to all states' position. But Narlikar demurs again, pointing out that:

... the two central principles of non-discrimination and reciprocity that underpinned the entire GATT system, undermined the agenda that developing countries had advanced since 1946, claiming that they should be allowed exceptions to the rules to facilitate their economic development.¹⁶⁰

¹⁵⁷ Mosoti, Victor, 'In Our Own Image, Not Theirs: Damages as an Antidote to the Remedial Deficiencies in the WTO Dispute Settlement Process: A View From Sub-Saharan Africa', issue 19, *Boston University International Law Journal*, 2001, p.231.

¹⁵⁸ *United States–Antidumping and Countervailing Measures on Steel Plate From India*, Report of the Panel, WT/DS206/R, para. 7110.

¹⁵⁹ *Ibid.* para 6.233.

¹⁶⁰ Narlikar, note 9, p. 1026.

On Narlikar's view, therefore, developing countries had aimed to achieve outcome-related fairness rather than fair procedure. They just failed to promote their aim rigorously, for fear of losing developed countries' interest in further negotiation. Fear of their non-co-operation may explain also why least-developed countries avoid bloc voting during WTO legislation-drafting sessions, even though they constitute the majority of voters in WTO forums. A victory for outcome-related justice, they reasoned, may undermine the very existence of the WTO.¹⁶¹

From this perspective, the WTO regime is nothing but the result of the hard politics and bargaining power of the more powerful countries, deployed to gain ascendancy over weaker nations. Accordingly, priority in that regime is afforded to efficiency, neo-liberal institutionalism's single most important attribute of global institutions, not to outcome-related fairness.

2.5 The symbiotic relationship of distributive justice and development

That developing countries' complaints are justifiable by a demonstration of the failure of the WTO to deliver outcome-related justice does not, however, constitute the fundamental critique of the WTO. Rather, that critique, in the present thesis writer's view, is the one that points out the failure of the WTO regime to construct the possibility of member-countries' development beyond the development of their legal systems to WTO-compliant stage.

¹⁶¹ Shadlen, note 93, p. 212.

It is no more than trite to note that both the categories ‘developing’ and ‘least developed’ presume upward mobility towards the category ‘developed’. Thus the categorisations ‘developing’ and ‘least-developed’ presume the mobility, not the hierarchical stasis, of countries thus categorised. There is no doubt that the WTO member countries that elected to place themselves into the ‘developing’ category did so to avail themselves of the WTO concessions regarding the time requirements for the implementation of WTO Agreements into their legal systems. But it is also true that a developing country is not deemed in the WTO regime to have become a developed country once its legal regime is wholly WTO compliant. Nor does a least-developed country become a developing one by dint of its having built a WTO legal infrastructure. Having once self-elected into these categories, WTO member countries stay in them. This stasis is in itself demonstration that the upward-mobility of the developing and the least developed is not an assumption of the WTO regime. This demonstration amounts to the tacit admission that there is no WTO mechanism for development. Absent such a mechanism, what in the WTO regime can be seen to amount to fairness?

2.5.1 Fairness and exemption from MFN and NT obligations

The Most Favoured Nation (MFN) principle is articulated at Article 1(1) of the GATT. Often called the cornerstone of the WTO Agreement, it requires WTO member states to treat all members equally; no member state may favour one member state above another:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or

immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

Article III of the GATT lays out the National Treatment (NT) principle. This Article has ten paragraphs. Not surprisingly, therefore, '[t]rade lawyers and scholars have been sorting through the legal implications of this obligation for decades'.¹⁶² The gist of the NT obligations, the same two commentators note, is the requirement 'that nations treat foreign individuals, enterprises, products, or services no less favourably than they treat their domestic counterparts'.¹⁶³ (The concern of these commentators, Nicholas DiMascio and Joost Pauwelyn, in the cited article is to identify the similarities and divergences of the NT principle in trade and investment law. But for the present purposes of this thesis, only their illumination of the nature of NT in the WTO context is of interest.)

DiMascio and Pauwelyn identify two objectives of NT. The first is 'to ensure that nations could not circumvent their tariff reduction commitments at the border by enacting discriminatory taxes or internal laws once goods had cleared customs'.¹⁶⁴ The second object, 'which, over time, became the most prominent one—is broader and more fundamental'.¹⁶⁵ To corroborate this point, they cite the Appellate Body's description of it in *Japan—Alcoholic Beverages*: to ensure that internal measures 'not be applied to domestic products so as to afford protection to domestic products'.¹⁶⁶

¹⁶² DiMascio, Nicholas and Pauwelyn, Joost, 'Non-discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?', vol.102, no. 1, 2008, p.58.

¹⁶³ Ibid.

¹⁶⁴ Ibid., pp. 59 – 60.

¹⁶⁵ Ibid., p. 60.

¹⁶⁶ *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996, para. 17.

These authors note that the intensity of the imposition of the NT obligation has varied over time. In the period 1947-1987, the focus was on tariff reductions, and ‘national treatment was relatively unimportant.’ During the second period, which began in ‘the late 1980s’, with tariff reductions well advanced, ‘the second objective of ensuring equal competition between imports and domestic products’ became more prominent ... More and more trade disputes centred on the question of discrimination, and most involved facially origin-neutral measures that nevertheless discriminated against imports in effect, or de facto’.¹⁶⁷

Importantly, ‘GATT national treatment ensures equal competitive opportunities, not actual sales’.¹⁶⁸ That is, GATT Article III(4) explicitly applies only to ‘all laws, regulations and requirements affecting internal sale, offering for sale’, purchase, transportation, distribution or use’ of products. DiMascio and Pauwelyn again cite the Appellate Body to corroborate this point:

... it is irrelevant that ‘the trade effects’ of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent; Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products’¹⁶⁹

After *Japan–Alcoholic Beverages*, ‘GATT parties began to challenge, and GATT panels began to find violations by, measures that discriminated only implicitly, or de facto’.¹⁷⁰ Panels focused on the ‘objectively observable characteristics of the goods, such as physical similarities ... whether they have similar end uses ...’, until the decision in

¹⁶⁷ DiMascio and Pauwelyn, note 162, p. 61.

¹⁶⁸ Ibid. p. 62.

¹⁶⁹ *Japan–Taxes on Alcoholic Beverages*, note 166, 14 February 1997, para. 136.

¹⁷⁰ DiMascio and Pauwelyn, note 162, p. 63.

*Tuna–Dolphins*¹⁷¹ ‘focused public attention on how this more intrusive approach can potentially impinge upon arguably legitimate domestic regulations’.¹⁷²

After the creation of the Appellate Body in 1995, the earlier determinations of the ‘likeness’ of products pursuant to GATT Article III(4) were abandoned, and the Appellate Body’s test became ‘a determination about the nature and extent of a competitive relationship between and among products’.¹⁷³ This is manifest in the Appellate Body’s decision in *Korea–Beef*,¹⁷⁴ where the point carried that whether ‘imported products are treated less favourably than like domestic products should be assessed ... by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products’.¹⁷⁵ It is manifest also in *Mexico–Soft Drinks*,¹⁷⁶ where the Panel reasoned that ‘[b]y examining the foreign and domestic products’ properties and end uses, consumers’ tastes and habits, and tariff classifications, panels determine the extent to which the products compete in the market’.¹⁷⁷

DiMascio and Pauwelyn note that GATT Article XX:

... enumerates a limited set of exceptions that a party may invoke to save a measure that formally violates Article 111(4) but that is also aimed at fulfilling

¹⁷¹ *United States- Restrictions on Imports of Tuna*, DS21/R-39S/155, Panel Report, 3 September 1991.

¹⁷² DiMascio and Pauwelyn, note 162, p. 63.

¹⁷³ *Ibid.*, p. 64.

¹⁷⁴ *Korea–Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, Appellate Body Report, 11 December 2000.

¹⁷⁵ *Ibid.* para 137.

¹⁷⁶ *Mexico–Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, Panel Report, 7 October 2005.

¹⁷⁷ *Ibid.*, para. 8.

one of the listed regulatory purposes, such as protecting public morals or human health'.¹⁷⁸

They note also that 'whereas under GATT Article III the burden of proof is on the complainant, the burden to invoke an exception under GATT Article XX is on the regulating country'.¹⁷⁹ These authors make reference to the fact that in *Chile–Taxes on Alcoholic Beverages*, whether there had been a violation of GATT Article III(1) – pursuant to which a violation exists only if a domestic regulation is applied 'so as to afford protection to domestic production' – was decided by the Appellate Body in the course of an analysis 'undertaken within the national treatment test itself, not under the GATT Article XX exceptions'.¹⁸⁰ The Appellate Body concluded that '[t]he mere statement of the four objectives pursued by Chile does not constitute effective rebuttal on the part of Chile'.¹⁸¹ Whether those objectives were defensible under GATT Article XX was therefore not addressed. This leaves the impression that domestic tax measures cannot be defended as GATT Article XX exceptions. Unfortunately, DiMascio and Pauwelyn do not comment on this.

The WTO's own statement of principles claims that a fairness principle operates in the WTO:

This principle is known as most-favoured-nation (MFN) treatment ... It is so important that it is the first article of the General Agreement on Tariffs and Trade (GATT), which governs trade in goods. MFN is also a priority in the General Agreement on Trade in Services (GATS) (Article 2) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (Article 4), although in

¹⁷⁸ DiMascio and Pauwelyn, note 162, p. 64.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid., p. 65.

¹⁸¹ *Chile–Taxes on Alcoholic Beverages*, WT/DS87/AB/R, Appellate Body Report, 12 January, 2000, para. 71.

each agreement the principle is handled slightly differently. Together, those three agreements cover all three main areas of trade handled by the WTO.¹⁸²

Quite where the fairness of NT lies is not immediately obvious. We see in the above cases that developing countries (in this instance, Mexico and Chile) are penalised for attempting to protect their domestic products against competition from the products of other countries, including developed countries'. It is intuitively obvious that this is unfair. NT threatens with the products of developed states the domestic industries of countries where economic development is struggling. To boot, invoking the special and differential treatment (STD) principle to correct this unfairness is not available to developing countries *vis-à-vis* the NT principle. The Panel in *Mexico–Soft Drinks* curtly dismissed Mexico's attempt to invoke it:

Separately, Mexico asserts that the Panel must take into account that the 'WTO Agreement contains principles and provisions the purpose of which is to grant more favourable treatment to developing countries'. While the covered agreements do in fact contain certain provisions that accord special and differential treatment to developing countries, Mexico has not identified any provision that might permit Mexico to accord less favourable treatment to products of another WTO Member than it accords to its own like products or to discriminate against directly competitive or substitutable products of another Member in favour of domestic production.¹⁸³

The 'fairness' of NT might be posited as DiMascio's and Pauwelyn's evaluation of the GATT and GATS. These Agreements, they say: '...sought to liberalise market access for foreign goods and services in order to boost overall welfare through a more efficient allocation of the of the world's resources'.¹⁸⁴ Efficient NT might well be: it binds all WTO member states equally and breaks down barriers to free trade. But it certainly does

¹⁸² 'Principles of the Trading System', WTO website, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm.

¹⁸³ *Mexico–Soft Drinks*, note 160, para. 2(148).

¹⁸⁴ DiMascio and Pauwelyn, note 162, p. 88.

not ‘boost overall welfare’ when it works to threaten local production in developing countries by the products of developed countries.

Because both the NT and MFN principles are imposed across the entire WTO spectrum of members, exempting none of them, economic/developmental differences among them notwithstanding, their adverse effects on developing countries are not correctable. The ‘difference’ principle (in Rawls’s sense) is operative in these principles only as a conditions-tied exemption from MFN obligations. This exemption is known as Generalised System of Preferences (GSP).¹⁸⁵ The voluntary benevolence to which this exemption amounts (developed states may but need not give developing states special and favourable market-access conditions) is the very Rawls/Nozick position with regard to justice in the international context that Pogge rejects. (As noted above, on Pogge’s scheme of international justice, voluntary benevolence is itself; it is not a realisation of distributive justice.) Given that this is also the very position the WTO declares with the above-quoted ‘voluntary benevolence’ cast of the exemption from the MFN and NT obligations, the possibility that there might be a pursuit of distributive justice (in Pogge’s sense) in the WTO framework is excluded *ipso facto*. The MFN principle determines the nature of WTO law,¹⁸⁶ in exactly the same way that the NT principle does.

2.5.2 The prerequisite of a commitment to development

A commitment to development presumes a commitment to distributive justice. As already observed, the Rawls/Garcia/Pogge positions takes into account that some segments of a

¹⁸⁵ See section 3.8.1 of this thesis for further discussion of the GSP.

¹⁸⁶ This point is expanded at Section 3.7.5 of this thesis.

society are less well endowed with resources for wealth generation than others. They acknowledge the same inequality of wealth-generating resources in the international context. Simply, some countries have an abundance of those resources, others very few of them. Some countries are therefore so placed that economic development for them is possible only if their resource-rich counterparts are willing to share the proceeds of their resources. This sharing is realisable in a process of distribution, in Pogge's sense of the term. On his view, to share the proceeds of resources is the essence of distributive justice. Distributive justice achieves fairness, because it gives the resources-poor a wealth base upon which they can develop whatever they have of trade capacity. Distributive justice should be a WTO principle. It, of course, is not. That is obvious in the way WTO agreements affect member countries: the resource-rich benefit from WTO agreements, the resource-poor do not. The ensuing Chapters will vindicate this observation by pointing out the effects of the major WTO agreements on three countries: the United Arab Emirates (UAE), Brazil, and Bangladesh. The solution, it will be argued, is in the introduction into WTO law of the international distributive justice principle, which, incidentally, realised distributive justice by distributing obligations, not resources/goods.

2.6 Conclusion

This Chapter sought out the criteria appropriate for deciding whether developing country's complaints about their position in the WTO is justified. A list of those complaints was compiled, followed by a discussion of the critics and supporters of the WTO 's performance *vis-à-vis* developing countries. It was proposed that this sort of exercise achieves no more than 'finger pointing', so no conclusion about whether

developing countries' complaints are justified can be drawn from it. The further proposition was that a theoretical underpinning is needed for reaching the conclusion sought, and that it is most likely to be found in the works of moral philosophers. A work of the state theorists Patterson and Afilalo was considered first, to indicate that it is not in state theory that *à propos* normative values are to be found. Rather, those values are propounded in the works of Rawls, Garcia and Pogge, for reason of their proposals on the nature of wealth-related justice and fairness, concepts that are inextricable from the concept 'trade law'. The position of each of these theorists was outlined, and it was concluded that that Pogge's sense of distributive justice provides the normative framework upon which the justifiability of developing countries' complaints can be decided. This Chapter attributed 'legitimate complainant' status to developing countries, citing Narlikar's successful denial that the WTO regime is concerned to deliver outcome-related justice, or even procedural justice. Vindication of the justifiability of developing countries' complaints, however, does not constitute the central critique of the WTO. Rather, that critique is in that the WTO regime has no inbuilt agenda to enable development. Simple logic dictates that for the development of developing and least-developed countries to be possible, the principle of distributive justice must infuse WTO law.

Chapter 3 will demonstrate that not all developing countries experience the WTO in the same way, and that not all of them complain about their WTO status. To do this, it will take a close look at the WTO experiences of the UAE and Brazil, two developing countries, the latter a democratic-state legal infrastructure, and the former a hierarchical

state, and of Bangladesh, a least-developed state with a tenuous democratic-state legal infrastructure. The need for distributive justice in a valid international-trade regulating body will be identified when the differences in the WTO experiences of these countries is traced to the core wealth-producing capacity of each, and a workable international distributive justice model will be proposed.

Chapter 3

The WTO Effect and Developing Countries

3.0 Introduction

The purpose of this Chapter is to demonstrate the effect on developing countries of their accession to the WTO. Attention will centre on Bangladesh, Brazil and the UAE. These countries are chosen as case studies because, as already noted at section 4 of Chapter 1 of this thesis, they illustrate the absence of sense in the term ‘developing countries’, and because they illustrate the WTO experiences of greatly different state structures: the UAE is a stable hierarchical state, Brazil a state with a firm democratic legal infrastructure, and Bangladesh a state with a weak democratic infrastructure. These three countries are therefore a rich source of diverse illustrative material for my argument that the WTO regime fails to support development. Where development has demonstrably occurred after WTO accession (in the UAE and Brazil), trade-capable resources were plentiful before accession; where development has demonstrably not occurred (in Bangladesh), trade-capable resources were scarce. Accession was followed by the development of the trade-capable resources of the UAE and Brazil, but by the near-destruction of the major trade-capable resource of Bangladesh: the TRIPs Agreement stimulated growth in Brazil’s pharmaceutical industry, the GATS Agreement energised the service sector in the UAE, but the post-MFA Agreements gravely exacerbated the economic vulnerability of Bangladesh, a least-developed country. The adverse WTO effect on Bangladesh, it will be argued, can be accounted for in terms of the WTO regime’s failure to support the development of the trade capacity of members with meagre resources. A correction of

this situation by a distributive-justice mechanism is proposed, and a suitable mechanism is sketched. An investigation of why it is that the WTO regime does not have a distributive-justice mechanism, even to the degree that its own special and differential treatment (SDT) and the Generalised System of preferences (GSP) provisions might seem to promote it, concludes that there is no explanation on record, save for a Leftist theory that a trans-national capitalist class is averse to it.

3.1 The countries that are developing countries

It was already noted in the introduction to this Chapter that my intention is to centre on Bangladesh, Brazil and the UAE because these three countries are a rich source of illustrative material for my argument that the WTO regime fails to support development. It should however be noted that these countries are not chosen for the power to explicate the nature of the WTO concept ‘developing countries’. Indeed, what these countries do explicate is that this concept is so indeterminate that it is not worthy of being accepted even as informal WTO nomenclature. As the ensuing discussion will show, the differences that obtain between these countries in terms of their wealth-generating (trade) capacity is so great that no trade perspective that would categorise them as ‘of a kind’ can be considered a rational perspective. Perhaps the very fact that WTO-related every-day parlance nevertheless perpetuates the ‘developing country’ category in itself betrays the likelihood that the WTO has never in fact taken seriously the idea that it is the most resource-deprived countries that need developing, and that they alone should be called the ‘developing (or least-developed) countries’. It is worthwhile to look into how

commentators approach the WTO's 'developing countries' concept before proceeding to deny that it is an intelligent categorisation.

3.1.1 Fan Cui's position

Fan Cui makes the salient point that '[n]either the WTO agreement nor GATT 1947 regime has made a precise legal definition for the term "developing country"'.¹⁸⁷

He notes, as a footnote to this remark, that:

Article XVIII of the GATT does provide that members whose economies 'can only support low standards of living and is in the early stages of development' may invoke the article. But this can hardly be a precise legal definition. Article XVIII of the GATT does not provide how low the standards of living should be and almost all members can claim that they are in the early stages of development.¹⁸⁸

And he notes that the WTO admits that:

[t]here are no WTO definitions of 'developed' and 'developing' countries. Members announce for themselves whether they are 'developed' or 'developing' countries. However, other members can challenge the decision of a member to make use of provisions available to developing countries.¹⁸⁹

Cui's comment on the enormous difference between the GATT and WTO concepts nevertheless remains only implicit. Yet the conjecture is unavoidable that the WTO intentionally distanced itself from the GATT recognition of developing countries as the poor ones by allowing WTO member states to self-designate as 'developed' or 'developing'. Cui does not conjecture thus, but proposes instead that:

¹⁸⁷ Cui, Fan 'Who Are the Developing Countries in the WTO?', vol.1, issue 1, *The Law and Development Review*, 2008, p. 123.

¹⁸⁸ Ibid. footnote 1.

¹⁸⁹ WTO, *Who are the Developing Countries in the WTO?*, www.wto.org/english/tratop_e/devel_e/dlwto_e.htm.

[a]lthough ‘self-designation’ is considered to be the basic method of designating developing country Members, some other methods are also used, and are often used along with ‘self-designation’, which attract less attention but are also important. In fact, the claim that ‘self-designation’ by ‘Special and Differential Treatment’ (SDT) beneficiaries is the basic method of identifying developing country Members is quite misleading. In practice, SDT grantors have more power than grantees in identifying developing country Members, which derogates from the effect of SDT provisions.¹⁹⁰

He then proceeds to note that ‘The WTO secretariat has classified 145 separate SDT provisions contained in the WTO agreements into six categories’,¹⁹¹ and that those provisions ‘only apply to the least developed country Members’,¹⁹² but he again refrains from commenting on the evasion of the ‘developing country’ concept that this SDT factor achieves. He is instead happy to proceed with what he calls the ‘main topic’ of his paper: ‘who should be given SDT, in other words, who are developing countries in the WTO’. The decks thus cleared, Cui continues to speak as if the ‘developing countries’ concept entails only least-developed countries. That is well and good insofar as SDT-worthy countries are the issue, but it is a move that gives up on the scrutiny of the WTO-recognised, albeit not defined, ‘developing country’ concept. He does not return to the ‘developing country’ definition issue until page 131 of his article. But even here, there is a conflation of the concepts ‘least-developed’ and ‘developing’ countries:

Developing countries are different in many aspects. Some countries such as South Korea have GDP per capita close to USD 20,000, but other countries such as East Timor have only GDP per capita as low as USD 400.¹⁹³

His proposition at this point is that South Korea and East Timor are both developing countries promises to obscure rather than crystallise the possibility of distinguishing

¹⁹⁰ Cui, note 187.

¹⁹¹ Ibid. p. 124.

¹⁹² Ibid. p. 125.

¹⁹³ Ibid. p. 131.

developing and least developing countries in terms of GDP. Cui himself concedes that much with his remark that:

... if all the developing countries, maybe 90% of WTO Members, were to claim that they are developing countries and should be treated equally, hence South Korea and Somalia are treated the same way, the countries that most need SDT will not benefit much from it ...¹⁹⁴

Quite rightly, he notes that the classification 'least-developed country' is a United Nations one, not a WTO one:

The list of LDCs is reviewed every three years by Committee for Development Policy (CDP) under the mandate of the United Nations Economic and Social Council (ECOSOC).¹⁹⁵

Cui notes also that ECOSOC 'keeps the number of LDCs as fifty', while paragraph 2(a) of Article 27 of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) provides that:

... the prohibition of export subsidy does not apply to the LDCs and a list of 20 developing countries, which are identified in the Annex VII. For these twenty countries, they have the same rights as LDCs as long as their GNP per capita is lower than USD 1,000.¹⁹⁶

He adds that on the SCM Agreement:

[a]ll developing countries are classified into four categories. The first category is the least developed countries. The second category is the twenty countries listed in Annex 7 whose GNP per capita is less than USD1,000. The third category is those countries 'in the process of transformation from centrally-planned into a market, free enterprise economy'. The fourth category is the other developing country Members.¹⁹⁷

¹⁹⁴ Ibid. p. 133.

¹⁹⁵ Ibid. p. 135.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid. p. 137.

Having noted this, and having made the further point that that the World Bank loans scheme contemplates similar categories, as do the International Food and Agricultural Trade Policy Council and EU proposals,¹⁹⁸ he returns to the WTO-recognised self-designation of developing countries as the right of members, and proceeds to outline how this right of self-designation can be restricted when SDT is the issue.¹⁹⁹ He concludes that legal uncertainty attends countries' SDT expectations, despite the fact that they self-designate as developing countries. What remains unclear in Cui's position is why he does not think that the SCM Agreement's list of twenty developing countries does not settle the issue of which developing countries can expect SDT. Also, implicit in his proposal of the criteria upon which developing countries can be identified²⁰⁰ is that the countries thus identified are entitled to SDT. This SDT-tied concept of developing countries is, on Cui's own demonstration, the derivative of a complicated minutiae of criteria. Even if it were pragmatic to pursue a definition of developing countries thus, one wonders whether the effort would be worth it, since SDT is not made obligatory by any aspect of WTO law.

In any case, Cui's intention is primarily to propound an argument that legal certainty should attend countries' SDT expectations. He points to a conflation of the concepts 'developed' and 'least-developed' country in footnote 3 of the Enabling Clause,²⁰¹ but points out that although the Panel in the *EC Tariff Preferences* case²⁰² 'found that the term "non-discriminatory" requires that "identical tariff preferences under GSP schemes

¹⁹⁸ Ibid., pp. 137-138.

¹⁹⁹ Ibid. pp. 139-143.

²⁰⁰ Ibid. pp 143-150.

²⁰¹ *Differential and More Favourable Treatment: Reciprocity and Fuller Participation of Developing Countries*, GATT BISD, 26th Supp, 203, GATT Doc L/4903, 3 December 1979, Multilateral Trade Negotiations Decision, adopted on 28 November 1979.

²⁰² *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, Panel Report, WT/DS246/R, 1 December 2003, para. 7.161.

be provided to all developing countries without differentiation, except for the implementation of *a priori* limitations” ... the Appellate Body²⁰³ ... reversed the Panel's finding that “developing countries” means all developing countries: the benefits under the Enabling Clause need not be granted to all developing countries, but rather only to those that are “similarly situated” .²⁰⁴ The upshot of this move is to highlight the fact that the ‘similarly situated’ criterion is inexplicit, and in fact allows one WTO member to become a GSP donor to a country, but does not oblige another to do likewise. Also significant for him is that ‘a general recognition of the developing country Member status does not mean the country can get all the STD’.²⁰⁵ Cui’s tacit premise appears to be that a perfectly delineated ‘developing country’ concept would allow a country that designates itself thus, if its self-designation is not disputed by other WTO members, to expect across-the-board STD. Cui’s reference in the context of this discussion²⁰⁶ to China and Chile as failed defenders before the DSB of their STD-deserving developing-country status makes a very telling point: If China with its GDP per capita of US\$6,000 is no better placed than Chile with its GDP per capita of US\$14,900 for that status, then the DSB’s tools for measuring the STD-deserving status of developing countries is very blunt indeed.

Cui finally posits the desirability of mandatory STD, and at the same time, proposes that this is the objective of the ‘commonly acceptable objective criteria’ that would define the concept ‘developing country’:

²⁰³ Ibid. Appellate Body Report, WT/DS246/AB/R, 7 April 2004.

²⁰⁴ Cui, note 187, p. 136.

²⁰⁵ Ibid. p. 140.

²⁰⁶ Ibid.

To design commonly acceptable objective criteria, especially numerical thresholds, is difficult, but it is necessary for any mandatory SDT to be operational.²⁰⁷

This position is tenable, however, only if one concedes that mandatory SDT is desirable. The counter-proposal that SDT would be rendered irrelevant if all developing countries (as they are yet to be defined in the WTO context) are exempted from all WTO burdens of membership and endowed with all its benefits immediately destroys the basis of the mandatory-STD aim. Otherwise, the present thesis writer is sympathetic with Cui's point that 'national income indicators may be used as the foremost criterion', but proposes that his subsidiary criteria²⁰⁸ are superfluous when GDP per capita is the definer. This is asserted firmly, given the absence of any demonstration that GDP per capita is not a sufficient definer. (This point will be defended later in this Chapter.)

3.1.2 Rolland's 'bargaining power of blocs'

Rolland²⁰⁹ is of the view that the distinctions 'developed/developing/least-developed countries' somehow associate with the bargaining power of coalitions in WTO forums. She traces a history of coalitions that threw up names such as:

The UNCTAD Group of Seventy-Seven (G-77); Informal Group of Developing Countries that included Argentina, Brazil, Egypt, India, Yugoslavia, Chile, Pakistan and Uruguay; the Association of Southeast Asian Nations (ASEAN); the Cairns Group of LDCs concerned with agricultural issues; other LDC coalitions such as the Friends of Fish that promote the elimination of fisheries subsidies and the Friends of Geographical Indications who sought the extension of protected geographical indications beyond wines and spirits, and the Sectoral Initiative in Favour of Cotton, a very small coalition of the cotton exporters Benin, Burkina

²⁰⁷ Ibid. p.143.

²⁰⁸ outlined at length on pp. 144-150 as considerations of national income, social factors, population size and sector competitiveness.

²⁰⁹ Rolland, Sonia E, 'Developing Country Coalitions at the WTO: In Search of Legal Support', vol. 48, no. 2, *Harvard International Law Journal*, 2007.

Faso, Chad, and Niger; the Mercado Comun del Sur (MERCOSUR), a regional trade agreement signed in 1991 between Argentina, Brazil, Paraguay, and Uruguay; the Caribbean Community (CARICOM) a regional negotiating machinery formed in 1997; the South Pacific Forum that co-ordinated action on development issues and trade in fisheries and marine resources; the African Group; the South Asian Association for Regional Cooperation (SAARC) of South Asian countries; the Organization of African Unity (OAU); the Group of Small and Vulnerable Economies.²¹⁰

Having conducted a very interesting review of the successes of these groups at a number of WTO ministerial conferences, and having noted that these successes were possible on the group level but would not have been attainable at individual-country level, Rolland proceeds to the critical point of her analysis, that is, the examination of ‘the rationales for legal recognition of groups and coalitions’²¹¹ that are operative in public international law, and specifically in WTO law. The basic position, she notes, is that:

... the entities that make up the WTO are – like in other international organizations – states and, to some extent, other international organizations. The EC is a distinct case, as both its members and itself are parties to the WTO, but the number of votes of the EC cannot exceed the number of its members. It is the only supra-national grouping of states that benefits from full legal recognition in the WTO.²¹²

But she immediately adds that:

The WTO also provides for some recognition for regional trade organizations through the Article XXIV notification process and rights. Yet the WTO’s legal framework has an impact on these entities and coalitions, which in turn influences the development of WTO law and practice. While supra-national groupings without formal legal existence, such as coalitions, are not recognized in WTO law any more than they are in general public international law, other international organizations have developed mechanisms to ensure some degree of regional or other group representation in addition to individual state participation.²¹³

²¹⁰ Ibid. pp. 487-499.

²¹¹ Ibid. p. 506 *et seq.*

²¹² Ibid.

²¹³ Ibid.

On the basis of this observation, Rolland proceeds to ‘to assess the interaction between each category of coalition and the WTO legal framework’. One category of coalition, the LDCs, are ‘given particular consideration as such’, specifically by the ‘2007 Technical Assistance Plan’, which is ‘designed to reflect existing patterns of collaboration between members and to further strengthen these groupings in a two-way flow of information and institution building’.²¹⁴ Also, this plan offers ‘regional coordinator internships’ to:

... the ACP, the African Group, the CARICOM, the Group of Latin American and Caribbean Countries (“GRULAC”), the SAARC, the WTO LDCs Consultative Group, the IGDC, the Arab Group, and the Pacific Islands Forum ... Other internships are aimed at LDCs and Small and Vulnerable Economies.²¹⁵

Whereas it is clearly arguable that the groupings Rolland thus identifies have the WTO recognition she claims they have, her ensuing comment that ‘WTO agreements already recognise LDCs as a distinct group with special needs that must be addressed as a subset of special and differential treatment’²¹⁶ is rather too generous. As already noted at 2.5.1 of this thesis, that recognition is far from substantive, for no mandatory privileges attach to it. Nevertheless, she rightly notes that ‘currently, the only category of developing countries recognized by the WTO as such is the LDCs’, and that ‘the WTO eventually gave an institutional home to LDCs with the creation of a Subcommittee on LDCs in the Committee on Trade and Development’.²¹⁷ She is right to note also that ‘of the fifty listed LDCs, thirty are WTO members, and several more have observer status’,²¹⁸ and that ‘LDCs account for 20 percent of WTO membership, almost as much as developed members’. But her claim, in the same sequence, that LDCs ‘represent a certain political

²¹⁴ Ibid. p. 507.

²¹⁵ Ibid. pp. 508-509.

²¹⁶ Ibid. p. 510.

²¹⁷ Ibid. p. 511.

²¹⁸ United Nations, List of LDCs, <http://www.un.org/special-rep/ohrlls/ldc/list.htm>.

force' is denied (inadvertently) by her admission that 'their share of international trade remains minimal'. The reader is left to wonder quite what it is that Rolland understands by 'political force', given this admission. Her recommendation that other UN-recognised groupings²¹⁹ should also enjoy WTO recognition is also lame, for lack of any demonstration that this recognition is of the least consequence for their development through the development of their trade capacities.

Rolland is nevertheless concerned to make her point that there is an 'objectivity' in the LDC categorization, whereas there is not in the 'developing country' self-categorisation.²²⁰ If by 'objectivity' she has in mind UN or WTO recognition of the clearly apparent, that is, the paucity or the trade capacity of LDCs that their GDP per capita demonstrates, then her point carries. She does, however, not identify GDP per capita as the indicator of rightful LDC status. Does she deny that GDP per capita is the basic indicator here? Though she is never explicit on this point, she does dismiss GDP per capita as an adequate indicator of a WTO member's claim to 'developing country' status:

In fact, it is often the case that a developing country member shows wide disparities in the development of the various sectors of its economy. Therefore, differentiation based on a single arbitrary criterion, such as Gross Domestic

²¹⁹ Rolland, note 209, p. 513, footnote 115: 'The United Nations maintains a list of Small Island Developing States (U.N. and non-U.N. members) and has recognized the need for special measures in favor of these countries since 1994, calling particular attention to these countries' vulnerabilities in the context of the Uruguay Round. G.A. Res. 49/100, U.N. Doc. A/RES/49/100 (Feb. 24, 1995). The United Nations also has defined a list of Landlocked Developing Countries. See generally Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries, and Small Island Developing States, <http://www.un.org/ohrlls/> (last visited Mar. 22, 2007) for a survey of U.N. undertakings for LDCs, Small Island Developing States, and Landlocked Developing States. A number of countries belonging to these three groups have joined the coalition of Small and Vulnerable Economies at the WTO, even though the issues of each group are quite different.'

²²⁰ Ibid. p. 514.

Product ... per capita, would not adequately reflect the broader state of a country's economy.²²¹

How, one must ask, is GDP really the 'arbitrary' criterion she says it is? GDP per capita is the calculation that takes account in a country of personal consumption, investment, government spending and exports, and subtracts the value of its imports from their total. None of the inputs of that calculation is arbitrary. She posits the view that GDP per capita 'would not adequately reflect the broader state of a country's economy'. But she declines to ruminate on quite what that 'broader state of a country's economy' might be, leaving the reader with the suspicion that she herself suspects that closer scrutiny of that concept will engage her in an unwieldy subjectivity that would demonstrate GDP per capita to be anything but arbitrary in comparison. Stiglitz said some time ago:

... one of the features which distinguishes more developed from less developed countries is their higher gross domestic product (GDP) per capita ... Contrary to Kuznets's contention, by and large, increases in GDP per capita are accompanied by reductions in poverty ... to some extent, the changes in society which may be called 'modernization' are as much a cause of the increases in GDP as a result.²²²

This is a fulsome endorsement of the perspicacity of GDP as illustration of the state of an economy. It is interesting that not even Sen is prepared to deny this illustrative power of the GDP. He allows that it is the indicator of economic inequalities, but insists that economic inequalities are less important indicators of human freedom, which, he insists, is the primary element of development, than are non-economic factors such as political freedoms, biological makeup, individual circumstances, gender, talents, pollution and

²²¹ Ibid.

²²² Stiglitz, Joseph E, 'Towards a New Paradigm for Development', 9th Raul Prebisch Lecture, United Nations Conference on Trade and Development, October 1998, <http://www.unctad.org/en/docs/prebisch9th.en.pdf>.

local crime, etc.²²³ Whether or not one sees merit in Sen's conception of the nature of development, it remains true that Rolland speaks only in an economic context, so Sen's position does not rescue her dismissal of the GDP as an accurate indicator of the state of an economy.

Rolland's argument stumbles on her curt dismissal of the reliability of the GDP calculation as an indicator of the state of a country's economy, and finally falls on her erroneous resort to the Enabling Clause, where she claims wrongly (see Cui, above) that in the *European Tariff Preferences* case there was, from the Appellate Body, an insistence on the non-discriminatory character²²⁴ of its provisions. As Cui points out, there was no insistence on the non-discriminatory character of the category 'developing countries'. The contrary is true, for this Panel determined that the benefits of the Enabling Clause accrue only to 'similarly situated' developing countries. So her ambition to illuminate what might be the 'recognition of more specific groups of developing countries based on transparent and uniform criteria' remains not only unrealized but obscure from the outset. Rolland does not reveal what would constitute the requisite criteria. Certainly, the Enabling Clause will not do that, nor does it lend itself to the 'recognition of more specific groups of developing countries' in any other way. Indeed, as Bhagwati says, the Enabling Clause allows the self-declared developing states 'to escape even the limited discipline'²²⁵ of Art XXIV²²⁶ if they enjoy the favouritism of a major developed or wealthy country or enter into a Regional Trade Agreement (RTA).

²²³ Sen, Amartya, 1999, *Development as Freedom*, (2nd ed., 2001), Oxford University Press, pp. 51-53.

²²⁴ Ibid. p.515.

²²⁵ Bhagwati, Jagdish 2008, *Termites in the Trading System: How Preferential Agreements Undermine Free Trade*, Oxford University Press, p. 95.

²²⁶ of the General Agreement on Tariffs and Trade (GATT) 1947.

(The basic purpose of the Enabling Clause is to relax the conditions under which RTAs between developing countries may qualify for exception from the MFN principle. This is discussed further at section 3.8.1 of this thesis.)

Rolland might be right to hold that a developing/least-developed country becomes a ‘more specific’ sort of developing/least-developed country if it becomes a member of an RTA. But then, this is a trivial differentiation, for it distinguishes the RTA-member developing/least-developed country from other developing countries only in that it is such a member. That sheds no light at all on which are ‘really’ developing countries, and gives no guidance on how that category might be defined. Rolland has not succeeded to sketch a route to that definition by way of her observations of the bargaining power of coalitions in the WTO system.

3.1.3 Karmakar’s obligations of successful developing-country negotiators

Accounting for the now-seven-years-old and still far-from-concluded Doha Round,

Suparna Karmakar recalls an interesting remark of Erikson²²⁷:

... developing countries have been justifiably suspicious of the hidden regulatory ambitions of the US and the EU. The US has been trying to **slip in environmental and labour standards** [*emphasis added*] into WTO agreements while EU has been pushing for increased regulatory powers under sustainable development clauses and multilateral investment agreements. Both have undertaken unilateral regulatory actions that have proved trade-impeding. In the present poor economic and financial climate of the West when developing country exports to these economies are naturally weakening, incessant push for unbridled regulatory powers at every opportunity clearly indicates that the erstwhile leading WTO negotiators are not interested in genuine and non-preferential reform and liberalisation. Their new professed ‘mainstream’ view on globalisation is clearly biased in favour of new trade regulations rather than

²²⁷ Erikon, F. ‘From Twin Towers to Fawltly Towers: The Story of the Doha Round’, ECIPE Working Paper, July 2008.

opening markets and re-energising this important engine of growth and development.²²⁸

This remark is interesting less from the point of view of the desirability of clarifying the ‘developing country’ concept than from the alternative point of view that classification matters little, for rapidly-growing economies, among which Brazil, Russia, India, China and South Africa (the BRICS countries), of which only Russia is not yet a WTO member, are now confident in their ability to reject developed countries’ proposals that do not serve the cause of their further development. Right though Karmakar is in her observation of certain developing countries’ vigorous and effective negotiating powers, it remains true that the adroit classification of countries along the developed/developing/least-developed spectrum in accordance with the GDP per capita ranking, and in concert with obligations distributed on the international distribute justice model (outlined below), developed countries will not be tempted to ‘slip in environmental and labour standards’ into WTO Agreements, for the countries (such a China and India) on which they seek to impose those standards will have been relieved *ex ante* of obligation to comply with them.

3.2 Extra-GDP definitions are not a worthwhile pursuit

This thesis writer proposes that a definition of ‘developing countries’ is not worth pursuing beyond the one already achieved by the rank-ordering of countries in terms of their GDP per capita. On that ranking,²²⁹ 55 countries come in at US\$ 20,000 and above;

²²⁸ Karmakar, Suparna, ‘Developing Countries in the 21st Century WTO: New Contours of India’s Global Engagement’, *The Law and Development Review*, vol. 2, issue. 1, 2009, p.38.

²²⁹ See CIA World Fact Book 2009, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2004rank.html?countryCode=#>.

43 countries (including Russia at US\$15,800) come in at between US\$10,000-US\$19,000, and the rest all fall below US\$10,000, to the lowest point (Zimbabwe) of US\$200. The UAE is 12th in the list of the top 62 countries at US\$44,600; Brazil (102 on the list) falls just inside the US\$10,000-19,000 bracket at US\$10,200; China, 133rd on the list, is in the below-US\$10,000 at US\$6,000; in the same bracket, India is 167th on the list, is well below it at US\$2,900, and Bangladesh is 197th at US\$1,500. It is very simply inferable from this illumination that 55 of the world's 229 economies are highly trade capable, 43 are viable, and the rest are struggling against odds at best, or are non-viable at worst.

Ergo, all members of the below-US\$10,000 group *should be* considered LDCs, the US\$10,000-19,000 group the developing countries, and all above the US\$ 20,000 the developed countries. This claim, 'should be', is not vacuous. It is made on the basis that the trading strength of a country is fully revealed by its GDP per capita status. What accounts for that strength – be it geographical advantage or disadvantage, political stability or turmoil, or anything else – need not be considered for the purposes of ranking along the developed/developing/least-developed spectrum. It is trade strength that has to be supported in the case of developing countries, and bolstered in the least-developed countries. Failure to support or bolster (as the need is) is also a failure to promote development. The readiest means of supporting or bolstering trade strength is the distribution along the developed/developing/least-developed spectrum of the burdens of WTO Agreements. This thesis writer proposes that all least-developed countries (on the definition tendered above: the GDP per capita 'below-US\$10,000' group) be absolved

from all the burdens of the WTO Agreements but afforded all their benefits. It proposes also that the developing countries' (the US\$10,000- US\$19,000 groups') WTO Agreements obligations be modified such that these countries become exempt from obligations that would detract from their trading capacity. (Obviously, the GDP per capita levels of countries do vary, so no country is fixed in the groupings proposed above. If a country's GDP per capita exceeds that of the developing or least-developed grouping that contains it, and remains in excess of it for a period of, say, four years, then that country can be considered to have entered the grouping above it, and capable of assuming its new group's WTO obligations.)

We shall now turn to the task of reviewing the benefits, and their opposite, that the WTO Agreements have made available to the UAE, Brazil and Bangladesh. The purpose of this review is to tender a justification of the distributive-justice approach to WTO Agreements as proposed above, and detailed in this Chapter at 3.5.

3.3 The UAE and the GATS

The UAE, a Gulf Cooperation Council (GCC) country and a federation of seven states (Abu Dhabi, Dubai, Ajman, Fujairah, Ras al Khaimah, Sharjah and Umm al Qaiwain), acceded to WTO membership in 1996, and is therefore signatory to the GATS. The GATS demands a level playing field for national and foreign investors: Most Favoured Nation (MFN) treatment, Article II of the GATS, and National Treatment, Article III of the GATS. The GATS also demands fair competition pursuant to its Article VIII, such that no monopoly-service provision is inconsistent with MFN treatment, and transparency

pursuant to Article III, such that all national laws, regulations, administrative guidelines and international agreements are fully disclosed.

The UAE has earned WTO praise for ‘the openness of its trade regime’, but also a measure of encouragement to:

... pursue its reforms, including further improvement of its multilateral commitments, with a view to enhancing the transparency and predictability of its trade regime, and its adherence to WTO principles.²³⁰

The UAE is still to correct ‘its limits on foreign equity participation’, and ‘the absence of competition legislation’, and the possibility that its ‘importing activities and distribution services’ might have remained ‘reserved for exclusive national agents’.²³¹ Despite this WTO chiding, it is a simple fact that the UAE’s *Agency Law*²³² is not fully GATS-compliant: While the UAE was free under GATS Article II(3) to offer preferential treatment to GCC countries as part of a Regional Trade Agreement, it is no longer free to do so, for the ‘grace’ period for full compliance by developing countries expired for it in 2005. It can no longer, to be WTO-compliant, give preferential treatment to national agents in areas where foreign suppliers of services are also active. The *Agency Law*, which allows the preferential treatment of national agents in the services sector, has nonetheless not been modified. This is potentially actionable, but no WTO member state has brought the matter before the DSB.

²³⁰ WTO, ‘Trade Policy Review: United Arab Emirates (UAE)’, 24-26 April, 2006, http://www.wto.org/english/tratop_e/tpr_e/tp263_crc_e.htm.

²³¹ Ibid.

²³² *Commercial Agencies Law* (Federal Law No. 18 of 1981, as amended by Federal Law No. 14 of 1988).

3.3.1 The Dubai Ports World showdown

Although GATS compliance is formally required of all WTO member states, and the UAE's *Agency Law* is, as just noted, not fully GATS-compliant because it allows the preferential treatment to national agents active in its services sector, it is not at all clear that there is a real-world obligation for UAE compliance here. Instead, it may be that the national treatment obligation imposed by the GATS is simply not politically viable.

Indicative of this is the furore that erupted in the USA when the UAE's Dubai Ports World Company, having bought the British-owned Peninsular and Oriental Steam Navigation Company (P&O) as of 2 March 2006, acquired control of the facilities of six US east-coast ports. Technically, *vis-à-vis* the GATS, the UAE was in a position to refer to the DSB, on 'national treatment' and 'most favoured nation' heads of action, any US discrimination against it as a buyer of P&O and the attendant rights, particularly since most US foreign ports are foreign operated.²³³ That, however, has not happened. Instead, Dubai Ports World voluntarily turned over operation of the ports in question to a 'US entity'.²³⁴ (Incidentally, another US occurrence of political uproar in the face of a prospective foreign purchase happened when the Chinese company CNOOC made a bid to purchase the US oil company UNOCOL.)²³⁵

In the light of political showdowns of this kind, it is unlikely that the UAE will be taken to task for its own GATS national treatment (NT) or most favoured nation (MFN)

²³³ Kaplan, Eben, 'The UAE purchase of American port facilities', Council on Foreign Relations, 21 February 2006, <http://www.cfr.org/publication/9918/>.

²³⁴ Alfano, Sean, 'Dubai Company Gives Up On Ports Deal: Move Comes As GOP Leaders Warn Bush that Congress Will Block Takeover', *CBS News*, 9 March 2006.

²³⁵ 'News Analysis', *Business Week*, 4 August 2005.

shortcomings. Having been denied a benefit of a GATS obligations, and having accepted the denial without demur, the UAE has earned a kind of ‘exempt’ status – not, of course, in terms of the GATS, but in real-politics terms. Indeed, the weakness of the GATS NT and MFN provisions are dramatically exposed in this showdown, their backs broken, as it were, by the power of national politics.

3.3.2 The UAE and its GATS benefits

Not only has there been a massive increase of investment in the UAE’s service sector, but the UAE has itself become an exporter of services. It has a large international air service (Emirates Airlines), an internationally competitive telecommunications company (Thuraya), the world’s fastest-growing free zone (Jafsa), and a bank (Dubai Islamic Bank) that has acquired significant international reach by instrument of the *sukuk*, a Sharia’h-compatible set of instruments that are now listed both on the Dubai International Financial Exchange and the London Stock Exchange. To boot, UAE investors, mostly from Abu Dhabi, and together with Qatar investors, owned a 32 percent controlling share²³⁶ of Britain’s Barclays Bank until it sold its stake in mid-2009, having doubled its value.²³⁷

The UAE governments have created several new free-trade zones, intending to propose themselves as a ‘global hub’ for portfolio management services, for gold bullion trading and a centre for technological research and development. To this end, they eased the

²³⁶ Flanagan, Martin, ‘Middle East Backers will “pay what it takes” to block Barclays Bailout’, *Scotsman*, 26 January 2009.

²³⁷ Reece, Damian and Dunkley, Jamie, ‘Barclays shares fall as Abu Dhabi Sheikh sells holding’, *Telegraph*, 2 June 2009.

foreign direct investment (FDI) rules regarding specific real-estate projects, especially in Dubai.

3.4 Brazil and the TRIPs

Brazil acceded to the WTO in 1995. This country's economy and potential for economic growth was once predominantly agriculture based. Its chief exports were primary-industry products. Scope for growth appeared for a long time to be in the increase of the volume and the upgrading of the quality of its agricultural produce through strategies such as fertiliser improvement and implementation of genetic-engineering techniques. Both these key strategies presume a capacity for research and development (R&D). Brazil set about establishing a strong R&D sector as early as 1970.²³⁸ Also, Brazil's biodiversity is vast, both in terms of the geographic area it covers and the variety of plant species that it holds. The emergence of a pharmaceutical industry was always plausible in this setting.

Aware of this, Brazil introduced its *Industrial Property Law* in 1996.²³⁹ Part of the purpose of this law was to encourage more foreign direct investment inflows into the country. It meant also to bring the Brazilian patent system up to the highest international standards, particularly with regard to patentable pharmaceutical items. But, most importantly, this law intended to conform with obligations that Brazil had assumed with regard to the TRIPs agreement.

²³⁸ Oda, LM, Correa Soares, BE and Valadares-Inglis, MC, 2000, in Tzotzos, GT, and Skryabin KG (eds), *Biotechnology in the Developing World and Countries in Economic Transition*, CAB International, pp. 43–52.

²³⁹ Law 9279, dated May 14, 1996, which came into full force on May 15, 1997.

Many Brazilian economists warned that patent protection at this level would not prove beneficial for the country, but would benefit only the foreign pharmaceutical companies operative on its territory. However, it is also true that the country had secured no patents in the seventy years prior to its signing and implementing the TRIPs Agreement, and there was no local pharmaceutical industry to speak about.²⁴⁰ The boldness of patenting to serve domestic pharmaceutical-industry interests gave the Brazilian economy a fillip. Present-day, post-TRIPs Brazil continues to give high priority to scientific and technological development in agricultural, energy and engineering (aeronautics) sectors.

Very significantly, Brazil's wealth-producing capacity is set to rise dramatically. Long a country that has relied 'on hydroelectric power for more than 80% of its energy needs and utilizes ethanol (or a gas/ethanol combination) to power 90% of the cars on its roads',

... in 2007 state-run Petroleo Brasileiro SA reported the largest Western Hemisphere oil discovery in 30 years in offshore territorial waters. Nearly two years after the discovery, Brazil is reforming its oil laws under a plan intended to divert a significant portion of the country's oil wealth towards improving education systems and combating poverty.²⁴¹

This new and dramatic source of wealth, used as President da Silva intends, will also raise the national GDP per capita, probably very significantly.

²⁴⁰ Mitsuuchi Kunisawa, Viviane Yumy, 2007, *The World Trade Organization and the Implementation of the Patent Provisions of the TRIPs Agreement in Brazil*, Munich Intellectual Property Law Centre, http://www.miplc.de/research/phd_theses/ongoing_phd/mitsuuchi_trips_brazil/.

²⁴¹ Johnston, Michael, 'Brazil's Oil Wealth: Three ETFs To Watch', ETFdb website, 3 September, 2009, <http://etfdb.com/2009/brazils-oil-wealth-three-etfs-to-watch/>.

3.5 Bangladesh in the post-MFA era

Bangladesh, one of the world's poorest countries, acceded to the WTO in 1995. Nearly half of this country's population of 135 million lives below the poverty line, as measured by income, consumption and ability to meet basic human needs. The Ready-Made Garments (RMG) industry contributes nearly 80 percent of its export revenue.

On the expiry of the *Multi-Fibre Arrangement* (MFA) in January 2005, the post-MFA era quickly made itself felt in this least-developed country. Its trade in textiles and clothing products become subject to the normal WTO rules. Those rules do not permit export quotas. All WTO members were required to phase them out by 2005, in order to become compliant with the Agreement on Textiles and Clothing (ATC), which came into effect on 1 January 1995. So bilateral quotas negotiated under the Multi-Fibre Arrangement (MFA), on which Bangladesh was heavily dependent, are no longer permitted by WTO law. This was, of course, consistent with the WTO's objective of trade liberalisation. It was also a demonstration that the WTO's trade-liberalisation objective is not moderated by any consideration of the damage it might do to a member state's staple industry. So although a 2003 estimate showed that the outcome of the ATC for Bangladesh would be 'a welfare loss of US\$400,000',²⁴² Bangladesh was fully held to compliance with the ATC discipline. This demand was not modified when, in 2006, a mere one year into to post-MFA era, a study showed that, as a consequence of the ATC, 'Bangladesh faces a

²⁴² Lips, Markus, Tabeau, Andrzej, van Tongeren Frank, Ahmed, Nazneen and Herok, Claudia, 'Textile and Wearing Apparel Sector Liberalization - Consequences for the Bangladesh Economy', 6th Conference on Global Economic, The Hague, The Netherlands, June 12 - 14, 2003, page 12.

0.7 percent loss in GDP and a 1.5 percent loss in per capita utility, and an overall welfare loss of Bangladesh is \$884 million'.²⁴³

This was not unexpected. Rahman²⁴⁴ accurately predicted that despite the theoretically available increase in opportunities, the rescinding of quotas will be onerous for small economies: Bangladesh's trouser exports, for instance, suffered significantly, while China's more than doubled after its 2001 accession to the WTO. Khan²⁴⁵ observed that the ending of MFA quotas in 2005 will lead to a loss of jobs for female garment workers, and perhaps even to a worsening of working conditions as producers try to cut costs to deal with global competition.

Wallich²⁴⁶ noted that the impact of the phase-out of MFA quotas on Bangladesh's RMG-export industry is subject to wide margins of uncertainty. The country is likely to lose the share it had of the US market while competitors such as China and India were constrained by quotas. But it would continue to have a competitive advantage in the European and Canadian markets, where it has tariff-free access, and where two-thirds of its exports are headed.

²⁴³ Ahmed, Nazneen, 2006, Bangladesh apparel industry and its workers in a changing world economy, PhD Thesis, Wageningen University, Netherlands. p. 57.

²⁴⁴ Rahman, Mustafizur, 'Bangladesh After MFA Phases Out', vol. 8, *South Asian Journal*, 2005.

²⁴⁵ Khan, Farida C, 'The Existing State of the Garments Industry in Bangladesh Under the Impact of Globalisation', vol. 1, no. 1, *Journal of the People's University of Bangladesh*, 2004.

²⁴⁶ Wallich, Christine I, 'Bangladesh: Remarks to the Foreign Investors Chamber of Commerce and Industry', 2004, <http://www.worldbank.org.bd/>.

3.5.1 The RMG sector did survive, but no thanks to the WTO

Brooks et al.²⁴⁷ claim that the WTO does make some effort to address this issue by means of the GATS, TRIMs, and TRIPs Agreements. Their relevant provisions should be exploited by Bangladesh, as indeed should the whole of the pertinent parts of the Hong Kong Ministerial Declaration.²⁴⁸ Section 36 of the Ministerial Declaration of the WTO's Sixth Ministerial Conference (Hong Kong)²⁴⁹ made known its endorsement of measures to favour least-developed countries, and pursuant to Annex F of that document, to encourage developed countries to extend duty-free and quota-free market access to least-developed countries:

We take note of the work done on the Agreement-specific proposals, especially the five LDC proposals. We agree to adopt the decisions contained in Annex F to this document. However, we also recognize that substantial work still remains to be done. We commit ourselves to address the development interests and concerns of developing countries, especially the LDCs, in the multilateral trading system, and we recommit ourselves to complete the task we set ourselves at Doha.

Yet the WTO made no move at all to make a cause of Bangladesh. Its RMG products were demanded mostly by Latin American and European countries. A reduction of demand for Bangladeshi RMG product falls was a known preliminary of a severe crisis in this country's foreign exchange reserve. Furthermore, it was clear that other export industries are unlikely to emerge in Bangladesh if the garment industry shrinks. This was evident in that growth in the large-scale manufacturing industry, excluding the garment

²⁴⁷ Brooks, DH, Fan, EX and Sumulong, LR, 'Foreign Direct Investment: Trends, TRIMs and WTO Negotiations', *Asian Development Review*, Vol. 20, Number 1, 2003, p. 54.

²⁴⁸ Identified in Annex F of the WTO's Sixth Ministerial Conference, http://www.wto.org/English/thewto_e/minist_e/min05_e/final_annex_e.htm#annexf.

²⁴⁹ WT/MIN(05)/DEC, 22 December 2005, Adopted on 18 December 2005.

industry, was a meagre 4 percent annually in the 1990s.²⁵⁰ Should its RMG sector fail, the Bangladeshi economy would be in a parlous state.

Given the attention to least-developed countries at the Sixth Ministerial Conference, and given that the post-MFA era is of the WTO's making, and that its adverse impact on Bangladesh was fully predictable, the WTO was in a good position to come to the aid of Bangladesh. But it did nothing. Bangladesh was left to indebt itself to the IMF: In 2004 Bangladesh's Minister for Finance and Planning, M. Saifur Rahman, sent a formal letter of intent to the International Monetary Fund (IMF) 'which describes the policies that Bangladesh intends to implement in the context of its request for financial support from the IMF'.²⁵¹ The main policy direction it outlines can be summarised thus: The ready-made garment (RMG) sector will open itself to foreign direct investment; the import regime will see further liberalisation, and the adoption of other measures to assist the RMG sector in, this, the post-MFA era.²⁵² Undertakings include: (i) a skills-development program for workers and managers in the RMG sector; (ii) retraining programs for displaced workers; and (iii) a capacity-building program for Small and Medium Enterprises (SMEs) at most risk, especially in technology and marketing.

With the IMF loan, and with the recent improvement in its export share due to the fact that its garment-industry workers are much cheaper than those of India and China, its

²⁵⁰ Scherer, FM and Watal, J, 'Post-TRIPs options for access to patented medicines in developing nations', vol. 5, *Journal of International Economic Law*, 2002, p. 918.

²⁵¹ Letter of Intent, Memorandum of Economic and Financial Policies, Dhaka, Bangladesh, July 8, 2004, International Monetary Fund web site, <http://www.imf.org/external/np/loi/2004/bgd/01/index.htm>.

²⁵² The WTO *Agreement on Textile and Clothing* 1995-2004, which provides for the progressive application of the entire range of GATT rules to the sector, including the gradual abolition of all remaining quotas by 1 January 2005, came into being as a result of EU initiative.

main competitors in the industry, Bangladesh's RMG industry survived. But it survived at the cost of a large hike in its national debt, and at the cost of serious unrest among workers in the RMG industry who are dissatisfied with their too-low wages: their violent protest in 2008 was an example of this.²⁵³ This picture is not consistent with the usual understanding of the meaning of 'development'.

3.6 The WTO Agreements and development

Nothing is more apparent in the foregoing comparison of the WTO effect on the UAE, Brazil and Bangladesh than that WTO Agreements will nurture development when a member country has the resources sufficient to render it trade capable, but will actually register as a destroyer of trade capacity in a single-industry member state like Bangladesh. Yet nothing has happened, even at ministerial level, to acknowledge this.

Begun in 2001 in Doha, Qatar, this Round was touted to be the 'development round', during which the needs of developing countries would be addressed. Negotiations finally collapsed on July 2008, after several stop-restart events. Efforts to revive it continue, with hope expressed that the G20 Summit in London on 2 April 2009 might achieve that. Not altogether unpredictably, nothing explicit in this matter has yet emerged from the Summit, despite the public mood that championed the right to development, particularly of least-developed countries.

²⁵³ *Bangladesh News*, '40 injured as RMG workers clash with cops', 18 June 2008, <http://www.bangladeshnews.com.bd/2008/06/18/40-injured-as-rmg-workers-clash-with-cops/>.

3.6.1 Right to development in international law

It is a fact that in international law, a commitment to development is enshrined in Articles 55 and 56 of the UN Charter. Pursuant to these Articles, the international community is called upon to facilitate the development of all nations and peoples. The WTO is not above the demands of the UN Charter. Developing countries such as Bangladesh therefore have a strong legal footing for an insistence that their right to development obliges the bending of WTO agreements in their favour, or, with regard to the mandatory/discretionary distinction, to afford them the benefit of the discretionary side of the law. To say this is effectively to assert that a ‘discretionary law’ has to be operative in the WTO legal scheme. Before proceeding to defend this assertion, it is appropriate to investigate the plight of the ‘right to development’ concept.

In its General Comment No. 3, the Committee on Economic, Social and Cultural Rights (CESCR) has stated that international co-operation for development, and thus, the pursuit of economic, social and cultural rights, is an obligation placed upon all states:

The Committee wishes to emphasize that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard.²⁵⁴

Without doubt, however, the most relevant and significant text is the Declaration on the Right to Development, adopted by the UN General Assembly (GA) in 1986 by a vote of 146 to 1 (United States). There were eight abstentions (Denmark, Federal Republic of

²⁵⁴ The United Nations Committee on Economic, Social and Cultural Rights, 2003 -2004, ‘The nature of States parties’ obligations’, *Jurisprudence of Human Rights Treaty Bodies* (Draft 1), para.14.

Germany, Finland, Iceland, Israel, Japan, Sweden and the UK). However, a number of industrialised countries voted positively (Australia, Belgium, Canada, France and Holland). There is therefore a possibility that, coupled with *opinio juris* (a belief by states that a practice is legally obligatory), this GA Declaration created a binding customary law. Some commentators demur, among them Brownlie,²⁵⁵ noting that it seems doubtful that a sufficient number of states have fully accepted the legality of the right to development for it to be considered *opinio juris*. One can nonetheless posit that the 1986 Declaration tends towards universal acceptance.

It is, unfortunately, also true that this Declaration is a shambolic conflation of many issues, and fails to be clear on what ‘development’ in this context means, what its relationship is to human rights, who holds the right to development, and on whom this right imposes duties. Is the right in question a ‘people’s right’ analogous to the theme of *fraternité* of the French Revolution? Probably not, for its Article 1 speaks of ‘every human person and all peoples’, thus implying the individual dimension as well as the collective dimension. Article 2, paragraph 3, adds to the confusion by introducing a third right-holder, ‘the state’.

Not surprisingly, this confusion provoked some commentators into denying the very existence of this nebulous right. Even Bedjaoui, a fervent champion of the right to development, said: ‘A right which is not opposable by the possessor of the right against

²⁵⁵ Brownlie, I, 1989, *The Human Right to Development*, Commonwealth Secretariat Study, pp. 14-15.

the person from whom the right is due is not a right in the full legal sense.’²⁵⁶ But he does not stay with this obviously clear-headed observation. He proceeds to claim that the right to development is, by its nature, so incontrovertible that it *should* be regarded as belonging to *jus cogens*.²⁵⁷ This is odd, for the recognised peremptory norms of international law prohibit heinous acts of *malum in se* such as genocide, racial discrimination and piracy. Bedjaoui makes no attempt to explain how ‘right to development’ might be inserted into the *jus cogens* framework.

The ‘third generation of rights’ theorists moved in to save the embattled concept ‘right to development’ as a human right. Thomas Pogge, a leading contributor to the theory, says that:

[t]he passive subject of the right to development can only be the international community as such. But as the international community has no means (organs, resources) of directly fulfilling its obligation under the right to development, it can only discharge them through a category of its members, that of the ‘developed’ states ...²⁵⁸

This position ‘takes the bull by the horns’ by beginning to posit that the right at issue, and the duties under it, are, but should not be, administered solely by the developed states as duty holders. The ‘right to development’ is truly a human right in which the duty holders are ultimately all individuals. Arjun Sengupta argues that the duty holders are, as agreed in the Declaration on the Right to Development:

... individuals in the community, states at the national level, and states at the international level. National states have the responsibility to help realize the

²⁵⁶ Bedjaoui, M, 1992, ‘The right to development’, in Bedjaoui (ed.), *International Law: Achievements and Prospects*, UNESCO and Martinus Nijhoff, p. 1182.

²⁵⁷ Ibid. p.1183.

²⁵⁸ Pogge, Thomas, ‘The International significance of Human Rights’, vol. 4 no. 45, *Journal of Ethics*, 2000, p.34.

process of development through appropriate development policies. Other states and international agencies have the obligation to cooperate with the national states to facilitate the realization of the process of development.²⁵⁹

Certainly, this is the right upon which the 2002 Delhi Declaration²⁶⁰ rested. It enunciated the precautionary principle and the common but differentiated responsibilities principle that forms the core of a workable definition of this ‘right’ concept:

... sustainable development can be considered as a global development model that entails linkages between economic, social and environmental policies that will allow future generations to continue to develop.²⁶¹

According to Cordonier Segger et al., this definition has the fulsome approval of the most active and informed theorists in the area.²⁶² Yet discomfort lingers in the present writer’s mind. It is easy enough to concede that a very significant success of the ‘right to development’ movement is that it successfully altered the theoretical terrain of human rights with its elaboration of the interconnecting issues that amount to a ‘new’ human right, that is, to the right to development. But it is difficult to forget that the ‘right to development’ had its inception as a morally fully justifiable claim by developing countries against the developed ones. This sits uneasily with the core principles of human rights (which *ipso facto* are individual rights), because an individual right to development does not lead to a claim for assistance. What good, then, can stem from ‘right of

²⁵⁹ Sengupta, Arjun, 2006, ‘The Human Right to Development’, in *Development as a Human Right: Legal, Political, and Economic Dimensions*, Andreassen, Bard A and Marks, Stephen P (eds.), Harvard University Press, p. 9.

²⁶⁰ *New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, UN Doc. A/57/329, 31 of August, 2002.

²⁶¹ *Ibid.* preamble, s. 13.

²⁶² Cordonier Segger, Marie-Claire, Khalfan, Gehring AM, Toering, M., ‘Prospects for Principles of International Sustainable Development Law after the WSSD: Common but Differentiated Responsibilities, Precaution and Participation’, vol.12, no. 1, *Review of European Community & International Environmental Law*, 2003, pp. 54-55.

development’ that cannot be claimed under the heads ‘economic rights’, ‘social rights’, ‘political rights’?

Perhaps a theory to demonstrate that there is a human right called ‘right to development’ is unnecessary. After all, Articles 55 and 56 of the UN Charter call upon the international community to facilitate the development of all nations and peoples. This is so whether or not there is a sound theory to demonstrate the existence, or non-existence, of a right called ‘right to development’, or whether or not that right is a human right. Therefore, when an issue is before the WTO that has to do with a countries’ development, the WTO is under Charter obligation to facilitate that development. The Charter does not permit it to do anything contrary to that. So, failing to give a developing country the benefit of discretionary law, the WTO fails to be UN Charter observant. The WTO could easily become so observant by adding a new standard of behaviour to its existing GATT-derived ones (MFN treatment, NT, transparency in tariff, *etc.* protection). That standard could simply be ‘observance of Articles 55 and 56 of the UN Charter’.

3.7 The need for international distributive justice in the WTO scheme

Along with a standard in the WTO that demands the observation of Articles 55 and 56 of the UN Charter, and in line with the argument propounded in Chapter 2 of this thesis concerning the symbiotic nature of development and distributive justice, this thesis writer proposes that the WTO should devise a mechanism whereby developing countries are exempt from the provisions of agreements that would harm their trade capacity. Such a mechanism would obviate the possibility of the gross harm, such as that done to

Bangladesh when it had to accept the consequences of the phase-out of the MFA. Making such a proposition, one is immediately up against two problems: one is that consensus on when a situation is just is not readily obtained, the other that there is a strong philosophical tradition that considers distributive justice a national, not international, moral obligation. This thesis writer proposes that both problems are disposed of quite easily, and that they are disposed of at sections 3.7.1 – 3.7.2 and 7.6.1 of this thesis.

3.7.1 Justifying the ‘this is just’ conclusion

A problem with which moral philosophy still contends is how we should go about agreeing that certain situations present themselves as instances of justice or injustice, and thence, how we should identify situations in which justice prevails. Needless to say, the problem here is the securing of consensus among the identifiers. Consensus is by nature the outcome of a political process, inasmuch it is the outcome of discourse among people with like and unlike values. In Part V of his work, *Restatement*,²⁶³ Rawls advances the view that at least one kind of ‘consensus politics’ is ‘political in the wrong way’. The game plan in consensus politics is to devise a policy in such a way that it will attract the support of a maximum of people at a particular time and in a particular place. The justification of that policy is not an issue. That is, it merely declares that ‘*x* is just’ and looks around for nods in agreement; it does not trouble to advise what makes *x*, and not *y* or *z*, the position worthy of being proposed as the just position. In other words, it omits the need for justification, leaving it to the balance of power between the head-nodding and head-shaking (and otherwise reacting) groups to determine the decision. This sort of politics is ‘political in the wrong way’ in Rawls’s sense precisely because it concerns

²⁶³ Rawls, John, 2001, *Justice as Fairness: a Restatement*, Harvard University Press.

itself with a means-to-an-end politics rather than with political relationships. Rawls makes these points thus:

For a political conception to avoid being political in the wrong way, it must formulate a free-standing view of the very great (moral) values applying to the political relationships. It must also set out a public basis of justification for free institutions in a manner accessible to public reason. By contrast, a political conception is political in the wrong way when it is framed as a workable compromise between known and existing political interests, or when it looks to particular comprehensive doctrines presently existing in society and tailors itself to win their allegiance.²⁶⁴

Rawls's political liberalism requires that there be a theory of justice that enables the analysis of the situation to hand, and that the analysis proceed in terms of the theory that exists to evaluate it, because the theory exists and survives only if it can be applied as the moral analysis that shows itself capable of pointing to how the justice of a situation is identified. Analysis in terms of a theory of justice is the mechanism of Rawls's justification requirement. But Rawls is far from blind to the 'political relationship' that his theory of justice must acknowledge if it is to reconcile individual freedom and the social necessity of the coercive authority that demands co-operation in the unequal distribution of benefits and burdens. If the terms of the social co-operation are fair, then, on Rawls's view, our freedom is not compromised by the coercion and inequality inherent in the political relationship, because we are a society, and therefore capable of generating the values that justify state authority. *Qua* a society, we are the agents of its justification.

²⁶⁴ Ibid. p. 188.

However one esteems Rawls's social theory, the important point is that justification, on his scheme, is an inalienable duty of the proponent of a position as the just position. And justification relies on the theory of justice of which a society is aware. Amartya Sen, in direct disagreement, argues that identifying perfect justice (as a theory of justice seeks to do) is neither necessary nor sufficient for evaluating the justice or injustice of particular proposals. He adduces an elegant metaphor to underline his point:

The possibility of having an identifiably perfect alternative does not indicate that it is necessary, or indeed useful, to refer to it in judging the relative merits of two other alternatives; for example, we may indeed be willing to accept, with great certainty, that Mount Everest is the tallest mountain in the world...but that understanding is neither needed, nor particularly helpful, in comparing the peak heights of, say, Mount Kilimanjaro and Mount McKinley.²⁶⁵

Sen commends that instances of injustice be 'diagnosed' from 'plural groundings', and thus on multiple and conflicting 'evaluative criteria' (axioms).²⁶⁶ His, it seems, is a 'social choice' theory that posits several capabilities: (i) individual 'inputs' of rational moral requirements can bring to light previously unsuspected 'social conclusions' (agreement); (ii) an estimate becomes possible of how many antagonistic 'inputs' preclude the possibility of the emergence of a 'social conclusion' about the justice/injustice of a proposal; and (iii) sets of axioms capable of agreement can be identified.

Where Sen is decidedly more than 'political in the wrong way' in Rawls's sense is in that he proposes the need for education in order that we become better equipped with these

²⁶⁵ Sen, Amartya, 2009, *The Idea of Justice*, Allen Lane, p. 102.

²⁶⁶ Ibid. p. 109.

three capabilities, and hence better-quality providers of ‘inputs’. At this point, Sen is going one better than Rawls anticipates with his description of the ‘political in the wrong way’ behaviour as one that frames a proposition ‘as a workable compromise between known and existing political interests, or ‘looks to particular comprehensive doctrines presently existing in society and tailors itself to win their allegiance’ Indeed, Sen wants to obviate the need for justification even in the small measure that it persists in the ‘political in the wrong way’ sort of pursuit of compromise. He wants an education that will brainwash us into conformity. That education is to be delivered by instances of public reasoning. These public performances would render us aware of the need to re-evaluate our personal axioms, then inspire us to go to war against parochialism with the new perspectives that our ‘enlightenment’ (the result of the instances of public reasoning from which we benefited) has given us. We should then not have to engage in the futile exercise of explaining why what we think just is just.

It is difficult to see how Sen’s reader can avoid the feeling at this point that Sen has in mind an intellectual programming of us. It is not at all clear why our Sen-commended educated ‘inputs’ are to be preferred to our continued efforts to explain our convictions about what is a just situation. Indeed, it is quite disturbing to be asked to accommodate a proposal that we be rendered educated to the point that ‘social conclusions’ about what is just come so easily to us that we need not bother with justifying our perceptions of what is just. Sen’s condemnation²⁶⁷ of the ‘insufficiency’ of the ‘transcendental’ (theory based) approach to agreement on when a situation is just or unjust fails to persuade precisely because the alternative that he proposes is something as disconcerting as our educated

²⁶⁷ Ibid. pp. 98-101.

‘inputs’ that easily achieve ‘social conclusions’/agreements. As already remarked, this is uncomfortably akin to a proposal that we be brainwashed into conformity.

Sen should nevertheless be credited with having pointed out that deviation among discrete societies from any ‘transcendental’ (theoretical) construct of justice is difficult to account for in terms of how a deviation from that construct is a deviation. Granting that there is such a difficulty, two concerns nevertheless remain: (i) how does the difficulty of an exercise invalidate that exercise, and (ii) what evidence is there that the difficulty of it is the most common, or even the significantly common, experience? That is, the existential import of Sen’s observation is far from weighty. Had he been able to adduce empirical evidence that the difficulty he notes is somehow evidence that ‘social conclusions’ (agreement) about which situations in the world are just is frustrated by reference to a transcendental construct of justice, this observation of his would have been significant. But, despite the fact that his terrain is squarely empirical, given that it is populated by empirical concepts such as individual ‘inputs’, ‘social conclusions’, and ‘education’ that improves the quality of individual ‘inputs’, Sen does not offer empirical evidence of any significant frequency of the ‘difficulty’ he identifies. Failing to do that, his criticism of the ‘transcendental’ construct of justice is decidedly lame.

3.7.2 Applied international distributive justice

Even so, Sen's position might find support when consensus is seen to be elusive when it is sought on the validity of a particular principle. Simon Caney²⁶⁸ might well be said to provide an example of that elusiveness when he investigates the level of justice in the principle that there is 'common but differentiated responsibility' in the reparation of conditions that have resulted in the peril of climate change that threatens human interests today. This principle, Caney argues, is untenable if it applies as the proposition that 'the user pays' is the moral determiner of how responsibility for the polluted state of the world is to be apportioned among states. It is also untenable if it is apportioned on the basis of which states benefit from having caused it.

A basic weakness of Caney's argument here is that he dismisses the possibility of attributing responsibility to states. He says:

... the only way to vindicate the conclusion reached by Neumayer, Shue, and others is to establish that the relevant unit of analysis is the state and that the other options collapse into it. Of course, further empirical analysis may reveal that it is simply implausible to hold that states are the appropriate entities and we need a fine-grained analysis which traces the contributions of individuals, corporations, states, and international actors and which accordingly attributes responsibilities to each of these.²⁶⁹

At no point of his argument does it become clear why Caney's 'other options' ('individuals', 'economic corporations', 'international regimes and institutions'²⁷⁰) are indeed other options, for clearly enough, it is in the purview of the state to control the GHG-emitting behaviours of individuals and of economic corporations. For that reason

²⁶⁸ Caney, Simon, 'Cosmopolitan Justice, Responsibility, and Global Climate Change', vol. 18, *Leiden Journal of International Law*, 2005, pp. 747–775.

²⁶⁹ Ibid. pp. 755–756.

²⁷⁰ Ibid. pp. 754–755.

individuals and economic corporations do indeed ‘collapse into’ the state. While it is certainly the case that individuals contribute to GHG-emissions by their use of GHG-emitting energy, and that some economic corporations are heavy GHG emitters, it is also true that they, too, are fully within the purview of the state: the state lets them do it. Even international regimes and institutions (Caney exemplifies them as the WTO and the IMF, both of which, he says, promote development and therefore ‘encourage countries to engage in deforestation and the high use of fossil fuels, both activities which lead to climate change’) are within the purview of the state inasmuch as the state can control the activities they encourage when those activities are GHG-emitting. They too, therefore, ‘collapse’ into the state. Caney quite simply cannot hope to succeed to rule out the easy justifiability of identifying the state as primarily responsible for GHG emissions and their control. His propositions of ‘other options’ as responsible entities are just too easily discounted, as the foregoing argument demonstrated.

However, Sen can be considered well supported here on his view that efforts to determine what is just do tend to flounder when their justifiability is an issue: Caney *does* demonstrate, by his argumentative stance, that ‘social conclusions’ (agreements) are not readily reached when we are asked to justify them. Then again, it is as well to remember that an unsuccessful attack (like Caney’s) on others’ justifications does not condemn justification as an unnecessary pursuit.

Caney notes at the outset that he intends to make ‘some methodological observations about the utility, or otherwise, of applying orthodox theories of distributive justice to

climate change'.²⁷¹ It seems that he concludes (for a number of reasons that are not interesting because they rest on his very easily refutable – as demonstrated above – premise that the state is not the only conceivable bearer of the 'user pays' burden) that because a collective (among other things, a state) cannot be held responsible for climate change, a distributive-justice based approach to the containment of climate-change-inducing factors is inappropriate. A goodly touch of *petito principii* (begging the question, that is, reaching a conclusion by building the conclusion into the premises of the argument) mars this conclusion: its form takes the collective out of the equation, thereby leaving no set of collectives among which the distributive justice principle can be operative. (He adds to this only the argument that the present generations cannot be held accountable²⁷² for the climate-change inducing activities of foregoing generations, nor can the still-living polluters of yore be blamed for their climate-change inducing activities, because they did not know them to be such activities.²⁷³ This argument amounts to no more than a rejection of corrective, or retributive, justice, which is not a feature of distributive justice.)

Probably the weakest part of Caney's position is that he presents the 'common but differentiated responsibility' principle as if it, *qua* the distributive justice principle, amounts to nothing other than 'the user pays' conclusion (in this case, that the developed countries are creating/have created the threat of climate change, and must therefore bear the climate-change-mitigating costs of other countries). Yet this principle, as even the UNFCCC and the Kyoto Protocol usually (admittedly, not always: see 7.6.1 of this

²⁷¹ Ibid. p. 749.

²⁷² Ibid. pp. 760 - 762.

²⁷³ Ibid. pp. 761 - 763.

thesis) recognise, is not an imposition of that burden at all. Rather, the imposed burden is that developed countries must set specific GHG emissions-reducing targets. That burden is not imposed on other countries. And therein lies the distributive justice principle as enunciated by the ‘common but differentiated responsibility’ principle.

Furthermore, Caney’s ‘methodological observations’²⁷⁴ make clear that his starting point is that:

... we should be alive to the distinctive aspects of the environment that might mean that its importance (for a theory of justice) cannot be captured by the orthodox liberal discourse of resources, welfare, capabilities, and so on,²⁷⁵

and that one should consider ‘whether the kinds of principle that should be adopted at the domestic level should also be adopted at the global level’.²⁷⁶ To situate his argument that follows – the one discussed above concerning the ‘other options’ (other than the state) that are identifiable bearers of responsibility – he notes correctly that ‘Rawls’s view is that justice does not require that the wealthy industrialised society should assist the poorer pastoral society’.²⁷⁷ There is, however, nothing analogous in transferring goods from developed countries in order to assist ‘the poorer pastoral society’ and the bearing of the greater burden of climate-related obligations that the UNFCCC and the Kyoto Protocol propose. A distribution of legal obligations is not the distribution of goods. Caney is therefore unsuccessful at harnessing Rawls’s approach to international distributive justice to his own argument, unless ‘user pays’ is indeed the valid

²⁷⁴ Ibid. pp. 749.

²⁷⁵ Ibid.

²⁷⁶ Ibid. p. 750.

²⁷⁷ Ibid. p.759. (Caney’s reference here is to J. Rawls, 1999, *The Law of Peoples with ‘The Idea of Public Reason Revisited’*, pp. 117-118.)

interpretation of the UNFCCC's and Kyoto Protocol's 'common but differentiated responsibility' principle.

But, as already noted, 'user pays' is not the valid interpretation of this UNFCCC principle; its valid interpretation centres on a distribution of obligations, not of goods. Rawls never did consider distributive justice as a distribution of obligations. His position to which Caney refers is therefore invoked pointlessly in an effort to disallow the validity of the 'common but differentiated responsibility' principle, which is an application of the distributive justice principle.

3.7.3 International distributive justice as the distribution of obligations

The distribution of burdens, this thesis writer proposes, is the proper basis of a theory of international distributive justice. That basis takes distributive justice well out of the tradition that confines it to the national sphere. I propose also that international distributive justice should not aspire to redistribute wealth among nations. Rather, it should, in the context of the international agreements that brought the WTO into being, distribute the obligations that body imposes on its member states. This conceptualisation of distributive justice departs considerably from the classic conceptualisation, attributable to Aristotle, that proposes distributive justice as the distribution of desirable things.

3.7.4 Aristotle's distributive justice

Aristotle, like the modern 'distributive justice' theorists, speaks only of distributing covetable things – 'honour or money or other things that have to be shared among

members of the political community'²⁷⁸ – along some socially agreed system of allocation. Very realistically, Aristotle notes that who are to be the recipients of honours, money, etc., in the name of distributive justice is hotly contested, that is, it is political:

Everyone agrees that justice in distribution must be in accordance with merit in some sense, but they do not all mean the same kind of merit: the democratic view is that the criterion is free birth; the oligarchic that it is wealth or good family; the aristocratic that it is excellence.²⁷⁹

Aristotle defers the explication of the content of the justice in distributing goods in *Ethics*, leaving us with only the conclusion that all agree that the distribution of good things must occur according to merit, but there are contending views about in whom merit lies. He approaches the illumination of the content of distributive justice in *Politics*.²⁸⁰ Approaching it with the proposition that the purpose of politics is to promote virtue (absolute justice), and hence, the happiness of all citizens.²⁸¹ He recognises, however, that there is no consensus on the contents of either virtue or happiness, and that because of this, the constitutional argument (what should be the content of politics?) arises. This, it has been said,²⁸² is Aristotle's proposition of the social relativity of justice in the distribution of goods: it is resolved variously, according to the capacity of societies to construct the best constitution they can. We recall, however, that he said in *Ethics* that the equitable (fair/just) man takes 'less than he might even though he has law on his side'²⁸³ when a constitution enforces a law that is not consistent with an absolute level of

²⁷⁸ Crisp, Roger (ed. and trans.), 2000, *Aristotle: Nicomachean Ethics*, Cambridge University Press, pp. 85-87.

²⁷⁹ Ibid. p. 178.

²⁸⁰ Jowett, B (trans.), 1996, *Aristotle, The Politics and the Constitution of Athens*, The Internet Classics Archive, <http://classics.mit.edu/Aristotle/politics.html>.

²⁸¹ Ibid. p. 13.

²⁸² Lisi, Francisco, 'The Concept of Law in Aristotle's Politics', vol. 16, no. 29, *Boston Area Colloquium in Ancient Philosophy*, 2001, pp. 40 – 41.

²⁸³ Crisp, note 278, p. 84.

distributive justice. Aristotle's distributive justice with regard to goods, therefore, does not impose standards on the society of which the laws emanate from a constitution; it leaves it a matter of the individual's sense of what best approximates absolute justices.

In fact, then, contemporary 'distributive justice' theorists take from Aristotle only the idea that the covetable (the 'good things' in the world) is distributable on the demands of justice. There is no fault *a priori* in the assumption that the covetable is the distributable in a quest for justice. However, at least one 'not-covetable', obligation, is also distributable in that quest. While respecting the distributive-justice achieving global taxation mechanism that Pogge advances (outlined in Chapter 2 of this thesis), I am moved to propose that distributive justice in a legal regime such as the WTO's is more efficiently realised by a distribution of obligations imposed by WTO law than it would be realised by a system of international taxation that would distribute the benefits of the world's resources fairly, such that distributive justice obtains.

Distribution of obligations, as degrees of constraint that bear upon the various categories (developed, developing, least-developed) of WTO-member country, would be more efficient in this context because that distribution demands only a minor adjustment to existing WTO law. (A suitable adjustment is proposed in Chapter 7 of this thesis, by way of a new law that will establish in the WTO the Kyoto Protocol's 'common but differentiated responsibilities and respective capabilities', and its characteristic distributive justice mechanism that distributes obligations according to capacity.) A Pogge style of resource-taxation, on the other hand, anticipates the massive exercise of

devising the suitable international taxation method and law. Besides, resource taxation would need a coercive body that would impose it, in the same way that the coercive nation-state body imposes taxation obligations. Of course, nothing in WTO law anticipates such a body. The creation of one would radically change the nature of the contract to which the present WTO member countries have acceded.

My international distributive justice model makes no such demand. It can easily be accommodated in the existing body of WTO law, for it needs no more than a new approach to the determining of developed, developing and least-developed country statuses as proposed above, and the attendant removal of the privilege of the self-election of countries into the ‘developing’ category. That done, the *erga omnes partes* obligations of WTO Agreements would be modified to exempt some members from all obligations, others from some of them, and the rest from none of them. With that, NT and MFN obligations are re-conceptualised, such that they impose only on obligations-bearing member states, and only in the measure that they bear obligations.

The degrees of obligation to observe WTO law would range from ‘nil’ to ‘absolute’. ‘Absolute observation’ would be the obligation of the top fifty-four developed countries, their position on the ‘nil to absolute’ obligation determined by the GDP per capita ranking (see section 3.2, above). ‘Nil observation’ would be the obligation of the least-developed countries, and ‘reduced observation’ of the interim, or ‘developing’, countries. This ranking achieves a distinguishing of countries in terms of their resources-owning and trade-capacity differences, and the distribution of obligations along this ranking

spectrum is consistent with the ‘differences’ concept central to the distributive justice theories of Rawls, Grice and Pogge.

3.7.5 Distribution of obligations in a ‘law of obligations’ context

A ‘distribution of obligation’ approach to distributive justice is particularly suitable for a body of law such as the WTO’s. That law is principally a law of obligations, and only incidentally a law of rights. Professor Chios Carmody expounds the latter view, which I endorse enthusiastically, in the course of his admirable effort to construct a theory of WTO law.²⁸⁴ Of particular interest for the defence of the international distributive justice model I propose is Carmody’s following analysis:

The theory of WTO law put forward here ... recognizes that the system’s principal concern is not with individual expectations per se, but rather with how collective expectations are distributed among the WTO membership as a whole. The prevailing model is therefore one of distributive justice. Distributive justice works to re-establish the arrangement of expectations according to the applicable metric of distribution, which in the case of the WTO Agreement is the equality mandated by MFN. When this can be done consensually, then the system is taken to work justly.²⁸⁵

Carmody’s footnote 54²⁸⁶ makes known that he is using his interpretation of Aristotle’s sense of ‘distributive justice’, which has nothing to do with expectations about the distribution of goods and everything to do with the imposition of obligations *erga omnes partes* that ensures the meeting of the expectations of the parties to the WTO treaty: ‘collective expectations are distributed among the WTO membership as a whole’ (see text quoted above). Carmody thus characterises WTO law as essentially a law of

²⁸⁴ Carmody, Chios, ‘A Theory of WTO Law’, vol 11, no.3, *Journal of International Economic Law* 2008, pp. 527-557, available at <http://jiel.oxfordjournals.org/cgi/content/full/11/3/527>.

²⁸⁵ Ibid., p.544.

²⁸⁶ Ibid.

obligations that distributes expectations equally across the WTO membership, on the MFN-mandated metric.

Now, it is for the distribution of these very obligations in accordance with the ‘differences’ principle, and not equally *erga omnes partes* on the MFN metric, that my international distributive justice model calls. But this does not cause my model to cease to be a distributive justice model, for it retains the chief characteristic of the concept as it is used by Rawls, Grice and Pogge: distribution on the principle that there are substantive ‘differences’ among WTO member states. If Carmody holds correctly that WTO law can be described as a law of obligations:

I have described WTO law as a law of obligations, something which is accurate as a preliminary description. This is because countries assume obligations towards other countries under the treaty, and these are extended to all other WTO members by virtue of MFN,²⁸⁷

then my proposed international distributive justice model hits its target: WTO obligations should not be obligations *erga omnes partes*. It is precisely because the WTO imposes obligations *erga omnes partes* that international distributive justice is absent from the WTO regime. *Erga omnes partes* obligations rest on the Aristotelian model of distributive justice as Carmody interprets it. My international distributive justice model rejects that model of distributive justice, for it does not allow for differences in expectations born of differences in capacity. My model distributes obligations on the ‘differences’ principle, such that some *partes* bear all treaty-agreed obligations, others some of them, and others still none of them. Importantly, unlike the distributive-justice theories propounded by Rawls, Garcia and Pogge, my international distributive justice

²⁸⁷ Ibid. p.545.

model distributes only obligations; it does not distribute ‘goods’, nor does it allow that the expectations of a ‘collective’ as diverse as that constituted by the parties to the WTO treaty can have the same (equally distributed) expectations: (i) Should my model attempt to distribute goods, as, for instance, Garcia and Pogge commend the distribution of benefits that accrue from certain nations’ natural resources, objections such as those voiced by Caney (see above) would work to undermine its legitimacy; (ii) should this model allow the tenability of the collective-expectations proposition, it would be open to refutation on simple empirical grounds. The level-playing field assumption that underlies the *erga omnes partes* distribution of obligations is not tenable: evidence of the substantive differences in the levels of that field is ample, and evidence of its being level is totally absent. That much is obvious in GDP illuminations alone. This wrong assumption must be corrected and compensated before the WTO’s can become a fair legal system. Hence my proposal of the principle of international distributive justice as a principle that distributes obligations on the ‘differences’ principle.

It must be said that this thesis writer owes a deep debt of gratitude to Professor Carmody for his theory of WTO law. His confirmation that WTO law is correctly described, at least as a preliminary description, as a law of obligations imposed *erga omnes partes* is the essential foundation for my proposal that my international distributive justice model should be introduced into the WTO legal regime to eradicate *erga omnes partes* obligations. Instead of it, WTO obligations must be distributed on the ‘differences’ principle that is the basis of my model of international distributive justice.

Carmody's theory proceeds to observe the characteristics of WTO law that are other than a law of obligations. But it at no point identifies any characteristic that would alone or together with another characteristics deliver the kind of international distributive justice that my model can deliver. I am again grateful for this, for it serves to corroborate my view that international distributive justice is totally absent from the WTO legal regime. Carmody identifies the following characteristics of WTO law that are other than laws of obligation:

WTO law as 'a regime of rights'²⁸⁸

The law is 'is more evidently a regime of rights' when consideration is given 'to certain realities arising in the course of trade'. He cites the panel's dismissal in *Turkey–Textiles* of Turkey's argument that it had the right to impose 'certain import restrictions on textiles and clothing prior to entering into a customs union with the EC ... because the restrictions were already part of the EC's WTO commitment' as evidence that:

WTO law as a law of rights is much less cohesive than WTO law as a law of obligations. A reality for one country will not be the same reality for every other country. Consequently, WTO law in this second mode is made up of a range of apparently unconnected rights arising in different circumstances. Their variability makes them more difficult to discern.²⁸⁹

Turkey's being a developing country evidently played no role in the Panel's reasoning.

Carmody sees a tension here in the DSB's case-by-case acknowledgment of 'realities'.

His footnote 57 notes:

This tension was at the heart of *EC – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 7 April 2004, where the Appellate Body had to distinguish between treatment of developing

²⁸⁸ Ibid., p. 545-550.

²⁸⁹ Ibid., p. 545.

countries as a group and their treatment as members of sub-groups or individually. The Appellate Body observed at para 169 that:

‘[W]e are of the view that the objective of improving developing countries’ “share in the growth in international trade”, and their “trade and export earnings”, can be fulfilled by promoting preferential policies aimed at those interests that developing countries have in common, **as well** as those interests shared by sub-categories of developing countries based on their particular needs.’ (emphasis in original).²⁹⁰

Further weakening the ‘rights’ aspect of WTO law is that rights are highly subject to ‘conditionality’, that is, to the thorough meeting of ‘requirements’ and to a ‘clear showing’ that requirements were met. To exemplify this, Carmody cites the Appellate Body’s observation in *Argentina – Footwear Safeguard*:²⁹¹

... it must always be remembered that safeguard measures result in the temporary suspension of concessions or withdrawal of obligations, such as those in Article II and Article XI of the GATT 1994, which are fundamental to the WTO Agreement. As such, safeguard measures may be applied only when all the provisions of the *Agreement on Safeguards* and Article XIX of the GATT 1994 are clearly demonstrated (emphasis in the original).²⁹²

‘Mutuality’ also serves to limit rights in the WTO legal scheme:

WTO law as a law of rights cannot be exercised in such a way as to eviscerate the rights of other WTO members, a doctrine known as abuse of rights (*abus de droit*).²⁹³

Carmody exemplifies this with reference to the Appellate Body’s observation in *Shrimp Turtles* that:

... a balance must be struck between the right of a Member to invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of the other Members. To permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other

²⁹⁰ Ibid.

²⁹¹ *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, 14 December 1999.

²⁹² Ibid. para. 95.

²⁹³ Carmody, note 284, p. 548.

Members. If the abuse or misuse is sufficiently grave or extensive, the Member, in effect, reduces its treaty obligation to a merely facultative one and dissolves its juridical character, and, in so doing, negates altogether the treaty rights of other Members. The chapeau was installed at the head of the list of ‘General Exceptions’ in Article XX to prevent such far-reaching consequences,²⁹⁴

and notes that:

A similar observation was made in *US – Line Pipe Safeguards*, where the dispute involved the US’s right to impose safeguards against imports of certain steel pipe from Korea.²⁹⁵

His assessment that ‘rights’ law in the WTO is of a highly restricted kind follows:

The Appellate Body’s statements in *US – Shrimp* and *US – Line Pipe Safeguards* illustrate the fact that the WTO Agreement as a law of rights involves action that is highly conditioned and contextualized, and that exists within a larger matrix of rights and obligations.²⁹⁶

‘Corrective justice’ in WTO law

Corrective justice, Carmody says, is a ‘second type of justice’ that ‘is at work in WTO law’. This justice is corrective ‘in the sense that it aims to repair harm done’. He adds that ‘the harm occurs because countries exercise their individual rights to take action that, strictly speaking, may disappoint expectations’. Article 22.2 of the DSU contains the facility that corrects ‘injury to specific interests’: it enables member states to negotiate temporary compensation for identified violations of WTO law’.²⁹⁷

²⁹⁴ *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 12 October 1998, para 156.

²⁹⁵ Carmody, note 284, p. 549.

²⁹⁶ Ibid.

²⁹⁷ Ibid. p. 532.

‘WTO law as a regime of *lex specialis*’²⁹⁸

Carmody explicates the meaning in the context of WTO of ‘lex specialis’ by comparing WTO obligations with those typically found in international law’. His context of comparison is International Law Commission’s Articles on State Responsibility (ASR), in which it is evident that ‘in the typical bilateral relationship rights are linked to corresponding obligations’. In that context, ‘the dominant impression’ is that ‘obligations under international law are of two types: either bilateral or collective, not both’:

ASR Article 2(1) provides that a country’s wrongful act imposes upon it an obligation of state responsibility. ASR Article 42(a) further specifies that this obligation is owed in the first place to the ‘injured state’, the injured state being defined as ‘the State whose individual right has been denied or impaired by the internationally wrongful act or which has otherwise been particularly affected by that act.’⁷³ ASR Article 42(b) goes on to specify that the obligation may be owed to the international community as a whole, or to a subset thereof, and Article 48 contemplates that responsibility may be invoked by a state **other than an injured state** provided that the obligation is owed to a group of states and is established for the group’s collective interest, or is an obligation owed to the international community as a whole.²⁹⁹

However, ‘WTO obligations have a dual quality’. Although ‘MFN operates to presumptively multilateralize all obligations under the treaty’ ... ‘there remain significant bilateralizing tendencies that work to counter this’. While ‘a purely collective arrangement would allow *any* country that is a member to contest a breach since the fundamental interest at stake belongs to *all*, ... the WTO Agreement ... requires individual countries to launch claims and only permits them to retaliate where they have actual trade with the defendant’. Likewise, countries invoking third-party status in dispute settlement are required to show a ‘substantial interest’. Carmody concludes that

²⁹⁸ Ibid. p.549.

²⁹⁹ Ibid. p. 550.

‘hybridity or combination is a good way to think about WTO obligations: bilateral in some instances, multilateral in most others.’³⁰⁰

Carmody does not see this ‘lex specialis’ character of WTO law as a weakness of it. On the contrary. He attributes to it the capacity to promote the interdependence of ‘bureaucrats and economic operators’, and their reliance upon ‘the rights and obligations of foreign governments’. He attributes to this *lex specialis* an ‘abductive logic or the logic of what might be’, which is a logic that ‘demands neither presumptions nor proof in all instances’, and is therefore the ‘transformative framework’ that is capable of the sort of transformation that the Doha Declaration on TRIPS and Public Health brought into being to modify the patent rights of pharmaceutical companies.³⁰¹

Very tellingly, Carmody does not see fit to include in his masterly characterisation of WTO law any reference to a law of rights that SDT or GSP, or to any ‘differences’-recognising text in WTO law, might constitute. Given his admirable methodological prowess, it would be foolhardy to think that this was an oversight. It is far more likely that to his mind these texts have no impact in the WTO, and are therefore not an aspect of WTO law at all. Totally absent from Carmody’s characterisation of WTO law is any suggestion that it is a law inclined in any way to accommodate differences among member states in a way that would reduce the burden of WTO obligations for some of them by taking into account their lesser trade capabilities. This corroborates the present writer’s view that the ‘common but differentiated obligations/responsibilities’ principle is

³⁰⁰ Ibid. pp. 550-551.

³⁰¹ Ibid. 551-552.

not operative in the WTO's legal regime, even to the extent that SDT or GSP might be said to be so operative.

Information from Professor Carmody in the course of correspondence with the present thesis writer qualifies this view. He made this point:

I do indeed think that what I propose in 'A Theory of WTO Law' may accommodate S&DT or GSP in the sense that these programs constitute a departure from the distributive justice model and are inherently 'corrective' in nature, hence continuing debate about quantification and how much developing countries 'get' in the process of S&DT/GSP.

Of course, Professor Carmody's sense of distributive justice is not my sense of distributive justice. My distributive justice distributes obligations according to GDP status, as a means of observing the 'differences' principle of distributive justice as it is understood by Rawls, Garcia and Pogge. As already noted, Carmody's distributive justice imposes obligations collectively, on the MFN matrix, in order to distribute the privilege of expectation evenly across all member states. If on his view SDT and GSP merely 'may' be a manifestation of corrective justice, which in any case appears to be a very minor facet of WTO law, then his brilliant theory of WTO law remains available to me as corroboration that the 'common but differentiated obligations/responsibilities' principle is not operative in the WTO's legal regime. That it is not is the necessary *a priori* condition that allows me to posit that justice demands a correction of WTO law by the infusion of it with the international distributive justice model I propose.

3.7.6 Distribution of obligation as an irredentist project

It will have become obvious to the reader that this proposal returns to chase the horse that bolted in the Uruguay Round, when developing countries lost their battle for full non-reciprocity privilege as part-and-parcel of special and differential treatment recognised by the GATT's Enabling Clause:

The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties,

and expanded by its Paragraph 5:

... the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latter's development, financial and trade needs.³⁰²

In defence of this proposal's irredentism, this writer notes that in fact the bolted horse has been brought back to the fold by most-developed countries' (notably the US's and the EU's) failure to abide by the market-access agreements to which they committed in the Uruguay Round. Specifically, their present agriculture subsidies and textile tariffs have 'gone back' on those agreements, despite the fact that those agreements became legally binding by instrument of 'the schedules annexed to Marrakech Protocol to the General Agreement on Tariffs and Trade 1994. Developing countries can therefore 'go back' on their having settled for living with their Uruguay Round loss of full non-reciprocity privilege.

³⁰² Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (Nov. 28, 1979), GATT BISD. (26th Supp.) at 203 (1980).

3.8 SDT provisions are not working in the WTO regime

It might be objected that a modification of WTO law with the inclusion of an active distributive-justice principle is superfluous, for the special and differential treatment (SDT) provisions already serve that purpose. The answer to that objection is that the SDT provisions are not in fact working. An instance of their emasculation by the DSB was pointed to at section 2.4 of this thesis, in the context of the *EC–Bed Linen* case. Amin Alavi³⁰³ points out an impressive set of others.³⁰⁴ Of particular interest to me in Alavi's preliminary remarks is that he posits the existence of the logical expectation of a nexus between the SDT provisions and support for development:

The logic is based on the fact that of all WTO provisions, developing countries should expect, and be expected, to benefit most from the SDT provisions; these were designed to make the trading system 'development friendly' ...³⁰⁵

It does stand to reason that the SDT provisions were designed to be 'development friendly', there being no other conceivable reason for their existence. The DSB, particularly at Panel level, is, however, all too ready to set them aside on technical/procedural grounds. A particularly egregious instance of this occurred in the DSB's rebuff of Benin and Chad in the *Uplands Cotton* case:³⁰⁶ Benin and Chad, both least-developed countries, joined Brazil as third parties,³⁰⁷ a procedure permissible under Article 10 of the DSU in this complaint against US cotton subsidies. WTO law available as provisions upon which SDT might have been extended to Benin and Chad in this case includes:

³⁰³ Alavi, Amin, 2009, *Legalization of Development in the WTO: Between Law and Politics*, Kluwer International.

³⁰⁴ Ibid. pp. 157-178.

³⁰⁵ Ibid. p. 154.

³⁰⁶ *United States – Subsidies on Upland Cotton*, WT/DS267, Request for Consultation, 27 September 2002.

³⁰⁷ So did Argentina, Australia, Canada, China, the European Communities, India, New Zealand, Pakistan, Paraguay, China, the Province of Taiwan and Venezuela.

(i) Article 21.2 of the DSU (the subject of Article 21 being ‘Surveillance of Implementation of Recommendations and Rulings’):

Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement;

(ii) Article 24.1 of the DSU, the relevant part of which provides:

At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members;

(iii) Article 7 of the SCM Agreement, which outlines the steps to be taken by a Member that claims to have suffered adverse effects within the meaning of Part III of that Agreement.

Effectively, however, the DSB process engaged none of these provisions: The Panel conceded that Brazil had suffered ‘serious prejudice’ in consequence of the US subsidising its own cotton producers. But it sided with the US and the EU on the view that the pertinent ‘serious prejudice’ issue can be only Brazil’s, not that of third parties. Benin and Chad argued that Article 24.1 of the DSU obliges the Panel to take into account the adverse effects on them, all be they third-party complainants. The Panel conceded that it is bound by Article 10.1 of the DSU to take into account the interests of the parties to a proceeding, and under the SCM Agreement, those of other members, even though they are not party to that proceedings. Nevertheless, it concluded that:

In taking such full account of all Members’ interests, we do not view it as conceptually or practically possible to take certain Members’ interests more fully into account than those of other Members.

Simply, the Panel did not take seriously Article 24.1 of the DSU as a provision with the capacity to give special status to the interests of least-developed countries. It concluded

instead that ‘the serious prejudice under examination by a WTO Panel is the serious prejudice experienced by the complaining Member’.

Benin and Chad put their Article 24.1 argument again to the Appellate Board (AB), this time supplementing it with the appeal that, since nothing in Article 6.3(d) of the SCM Agreement limits a finding of ‘serious prejudice’ to the complaining party, the AB:

... draw conclusions under Article 6.3(d) that would require the United States to withdraw the subsidy or remove the adverse effects, not only with respect to Brazil, but also with respect to Benin and Chad.³⁰⁸

That conclusion, Benin and Chad proposed, is available pursuant to Article 5 of the SCM Agreement: ‘No Member should cause, through the use of any subsidy ... adverse effects to the interests of other Members, i.e. ... (c) serious prejudice to the interests of another Member.’ The AB summarises these two least-developed countries’ approach to it thus:

Benin and Chad request us to find that their interests have suffered serious prejudice in the sense of Article 5(c) of the *SCM Agreement*, if we find Brazil has suffered serious prejudice as a result of an increase in the United States' world market share in upland cotton in the sense of Article 6.3(d) of the *SCM Agreement*.³⁰⁹

Being fully aware of the legal simplicity of this request of Benin and Chad, and having professed itself aware of Article 21.4 of the DSU and declared that the Panel members ‘fully recognize the importance of this provision’, the Panel lightly dismissed it:

As we do not find it necessary to rule on Brazil's appeal regarding the interpretation of the phrase ‘world market share’ in Article 6.3(d), we therefore are not in a position to accede to Benin and Chad's request to complete the analysis and to find that, in addition to Brazil, Benin and Chad also have suffered serious prejudice to their interests in the sense of Articles 6.3(d) and 5(c) of the

³⁰⁸ WT/DS267/AB/R, 3 March 2005, para. 214.

³⁰⁹ Ibid. 512.

SCM Agreement. We note that Benin and Chad's request³¹⁰ to complete the analysis was predicated upon us reversing the Panel's interpretation of the phrase 'world market share' in Article 6.3(d) of the *SCM Agreement*. This condition is not met.³¹¹

Evidently, on this DSB AB's reasoning, the DSU's Article 21.4 demand does not exist as an SDT requirement if this Body is not inclined to bring down an interpretation of 'world market share'. Also evidently, the fact that cotton growing is the staple industry of these two least-developed countries carries no weight all in this legal context.

I selected two instances of judicial reading-down of SDT provisions³¹² (Article 15 of the Antidumping Agreement and Article 24.1 of the DSU) to illustrate that the judicial attitude they demonstrate has to be scrutinised and explained. This was seen to be necessary despite the excellent four-fold explanation that Alavi tenders:

First, the invoked provision is not applicable to the situation. Second, the facts of the case do not support the invoking party. Third, the invoking party does not back up its claims by providing sufficient information. Fourth, the judiciary does not interpret the invoked provisions in a 'development friendly' manner.³¹³

Alavi's first three explanations, upon which he proceeds to expand, are also the DSB's own explanations. These explanations are explanations only in the sense that they give an account of what happened in the DSB process: they are illuminations of the various points of that process. But they do not explain *why* the DSB bodies reasoned as they did. For instance, why did those bodies not explore possibilities that would have allowed the applicability of the invoked provisions, or direct the invoking parties to supply more

³¹⁰ Benin's and Chad's third participants' submission, para. 83.

³¹¹ WT/DS267/AB/R, note 42, para. 512.

³¹² Alavi, note 303, offers more illustrations; see pp. 162-179.

³¹³ Ibid. p.197.

information where they considered the tendered information insufficient? An equity-court approach certainly allows, indeed expects, such activity. The DSB bodies gave no semblance of equity-court approach; they were not inclined to give a maximum of scope to the SDT provisions of either the DSU or of the Agreements. I propose that the missing *why* explanations are in fact subsumed in Alavi's fourth explanation: 'the judiciary does not interpret the invoked provisions in a "development friendly" manner'.

Alavi holds himself rigorously to identifying the legal basis of all four of his explanation. For the fourth one, however, he appears to concede that there is none, and concludes his search by citing F. Roessler³¹⁴ to corroborate his view that:

... in most cases, the parties have not appealed against panels' findings on the invoked SDT provisions. Thus the Appellate Body has not had a chance to review them.³¹⁵

3.8.1 GSP: The Enabling Clause and the limited scope of SDT through GSPs

The Preamble to the WTO Agreement³¹⁶ recognises the '...respective needs and concerns at different levels of economic development', but this recognition is codified in the WTO legal system only as the Enabling Clause. In 1971, the legal framework for the operation of Generalised System of Preferences (GSP) was laid out as a 10-year waiver to the MFN principle articulated in Article 1(1) of the GATT. The Enabling Clause was the outcome of the 1979 Tokyo Round. Successor of the 1971 Waiver Decision, the Enabling

³¹⁴ Roessler, F, 2005, F, 2004, 'Special and Differential Treatment of Developing Countries under the WTO Dispute Settlement System', in Ortino, F and Petersmann, E (eds), *The WTO Dispute Settlement System 1995-2003*, Kluwer Law International.

³¹⁵ Alavi, note 303, p. 184.

³¹⁶ Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, entered into force 1 January 1995.

Clause became a (conditions-tied) permanent exception³¹⁷ from the MFN principle, the cornerstone of the WTO Agreement. The Enabling Clause is the framework of the operation of the GSP. The *EC-Tariff Preferences* case³¹⁸ has laid out the issues of what constitutes the proper relationship between the Enabling Clause and Article 1:1 of the GATT 1994. The Enabling Clause confers an autonomous right on developed countries to establish GSP schemes, on condition that those schemes are compliant with the requirements of the Clause itself. Paragraph 2(a) of the Enabling Clause stipulates that preferential tariff treatment granted to developing countries by developed countries must be ‘generalized, non-reciprocal and non-discriminatory’. DSB jurisprudence has established that differentiated treatment of similarly-situated developing countries is discriminatory. However, differences in treatment, so long as those differences are attributable to beneficiary countries’ different economic (and other) circumstances, is not discriminatory,³¹⁹ provided that the requirements of the Enabling Clause are met: the treatment is ‘generalized, non-reciprocal and non-discriminatory’ and intended ‘to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of other contracting parties...’.³²⁰

Fine though the GSP philosophy and the Enabling Clause are, WTO law imposes no obligation on developing countries to become GSP donors. A valiant effort of Kele Onyejekwe makes out a case to the effect that the ‘right to development’ imposes an

³¹⁷ Ibid. Annex 1A, GATT 1994, 1(b)(iv).

³¹⁸ *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, Panel Report, WT/DS246/R; Appellate Body Report, WTDS246/AB/R.

³¹⁹ *EC-Tariff Preferences*, Appellate Body Report, Ibid., para.71.

³²⁰ para.3(a).

obligation on developed countries to give GSP treatment to developing countries.³²¹

However, the Appellate Body in *EC – Tariff Preferences* declared unequivocally that pursuant to the Enabling Clause and the various commitments to development in WTO Agreement texts, WTO members are only ‘encouraged’ to do so.³²² It is nevertheless true that the 2005 Hong Kong Ministerial Declaration will bind at least the developed WTO members if it remains unchanged when the Doha Round is finally concluded. That Declaration provides thus:

Developed-country Members shall, and developing-country Members declaring themselves in a position to do so should:

- (a) (i) Provide duty-free and quota-free market access on a lasting basis, for all products originating from all LDCs by 2008 or no later than the start of the implementation period in a manner that ensures stability, security and predictability.
- (ii) Members facing difficulties at this time to provide market access as set out above shall provide duty-free and quota-free market access for at least 97 per cent of products originating from LDCs, defined at the tariff line level, by 2008 or no later than the start of the implementation period. In addition, these Members shall take steps to progressively achieve compliance with the obligations set out above, taking into account the impact on other developing countries at similar levels of development, and, as appropriate, by incrementally building on the initial list of covered products.³²³

At the moment, GSP donors can withdraw the beneficiary status of developing and least-developed countries when they please. Beneficiary status therefore enjoys no legal certainty of continuation. In short, GSP is yet well short of constituting a significant aspect of WTO law.

³²¹ Onyejekwe, Kele ‘International Law of Trade Preferences: Emanations from the European Union and the United States’, vol. 26, *St Mary’s Law Journal*, 1994.

³²² paras 92 and 111.

³²³ Decision on Measures in Favour of Least-Developed Countries, WTO Hong Kong Ministerial Declaration, WT/MIN(05)/DEC, Annex F, para 36.

3.8.2 Absence of political will in the WTO to shore up SDT and GSP provisions

Despite the demonstrable failure in the WTO regime to deliver distributive justice even to the extent that the SDT principle and the GSP provisions codified by the Enabling Clause might be seen to seek to deliver it, there is no substantive political move in the WTO to shore up even these provisions. As Finger observes,³²⁴ even at WTO Ministerial level, no more was attempted than the formulation of a work program³²⁵ that attempted to do no more than was already done by ‘the traditional GATT approach to developing countries’.³²⁶ Finger’s closing comment on this point reflects my view that the extant SDT provisions are ineffective in the WTO’s legal regime:

... Robert Hudec concluded 20 years ago that insistence on special and differential treatment was politically ineffective ... He also demonstrated that as a legal matter, it was impossible to transform such elements into generic obligations.³²⁷

3.8.3 The WTO and the TCC

Why, then, is the WTO not pro-active in promoting development by adopting some sort of distributive justice mechanism that acknowledges the trade-capable differences of WTO member countries? The answer might be as Muhammad Rowshon Kamal³²⁸ and his fellow thinkers³²⁹ propose: the WTO is itself controlled by a very visible trans-

³²⁴ Finger, Michael J, 2009, ‘Trade and Development: Systemic Lessons from WTO Experience with Implementation, Trade Facilitation, and Aid for Trade’, in *Developing Countries in the WTO System*, Thomas, Chantal and Trachtman, Joel P (eds), Oxford University Press, pp.92-94.

³²⁵ WTO, ‘Doha Work Program: Decision Adopted by the General Council on 1 August 2004’, 2 August 2004, WT/L/579, cited by Finger, note 325, p.93.

³²⁶ Finger, note 325, p.93.

³²⁷ Ibid. p. 93-94.

³²⁸ Kamal, Muhammad Rowshon, ‘Industrial Espionage *vis-à-vis* RMG sector – Ways to Combat It’, *Independent*, 12 January 2005, p. 88.

³²⁹ notably, Sklair, Leslie, ‘The Transnational Capitalist Class and Global Politics: Deconstructing the Corporate-State Connection’, vol. 23, no. 2, *International Political Science Review*, 2002, pp. 159-174.

national capitalist class (TCC).³³⁰ This is certainly an alluring thesis, despite its conspiracy-theory hallmarks: ‘alluring’ for reason alone that no alternative thesis is on offer. The TCC, Kamal proposes, is simply not interested in the development of the developing states. The TNC exercises the dominant influence on the creation and sustenance of international institutions, including the WTO. The two central interests of the TCC in the WTO are the internationalisation and extension of property rights (as in the TRIPs, TRIMs and GATS) and the existence of global markets, both in the goods and the service sector.

Like all dominant classes, the TCC seeks to represent its interests as universal interests. The TCC cannot, however, alone carry the burden of creating, sustaining and redefining international institutions in its interests. In order to obtain a broader support base for its globalisation agenda, it courts a coalition with the national bourgeoisie. In concrete terms, this means that while the TCC seeks a harder and effectively enforced IPR regime and a global market for goods and services, it seeks also to protect the vulnerable segments of the national bourgeoisie with tariff (against the free flow of processed goods) and non-tariff (often disguised as environment protection measures) barriers. The effectiveness with which tariffs protect the interests of the national bourgeoisie depends on the nature and character of the state, its role in international trade, and on its capacity to ‘bring off’ a TCC/national bourgeoisie coalition.

³³⁰ According to Kamal, the TCC is the class that benefits from the accelerated globalisation of trade, finance and production and has used an opportune moment in the history of international relations, manifested in the absence of an effective counter power to Organization for Economic Cooperation and Development (OECD) countries, to codify its interests in, *inter alia*, WTO Agreements.

However, the coalition-forging strategy is not easily available to least-developed states, for they tend to lack the power to successfully protect their national bourgeoisie against the demands for greater market access by hegemonic states. While the defence of the interests of the national bourgeoisie is not always an unfair demand (it may go some way to prevent de-industrialisation) it does not necessarily go to meet the concerns of the subaltern classes, such as the rising prices of essential life-saving drugs. Also, since a least-developed state often cannot effectively protect the interests of the national bourgeoisie, a section of the latter may align itself with the subaltern classes. The constraints of electoral politics mean that the least-developed state cannot dismiss the concerns of this coalition.

The WTO is a multilateral institution whose rules and organisational structure have been negotiated between states. While this portrayal is correct and captures a vital aspect of the creation and continuance of the WTO, it does not tell us everything about the global social forces that called for a new trade institution to replace the GATT.

It must be stressed that while the TCC exercises a dominant influence over the shaping of the WTO, the process of arriving at WTO rules is a highly complex and mediated process. The complexity that informs the negotiation of 'trade' policies and their social implications are a function of a range of factors: (i) the extent of dominance of the TCC over the shaping of global economic policies in important states (both First World and Third World states); (ii) the strength of the national bourgeoisie and its interests at stake in these states; (iii) the nature of resistance mounted by the old and new social

movements against particular trade rules; (iv) the expertise available and deployed by Third World states in the negotiations; (v) the pressure that can be brought on important developing states (India, Brazil, South Africa, Nigeria, China, Venezuela, Argentina, etc.) by powerful developed states; and (vi) the ability of the Third World states to build and maintain coalitions in particular issue areas. It is a combination of these factors that makes the WTO negotiations such a contentious process.³³¹

It is also customary to think of the WTO in terms of the North-South divide. While thinking in terms of a rich and powerful North and a poor and powerless South is useful, particularly in analyzing democracy and development deficit in WTO, the imagery does not allow the insight that certain classes in least-developed countries are clear beneficiaries of the WTO regime. In other words, the language of the North-South divide can be bewildering, as it seems to suggest that there are no sections within the South that support the cause of the WTO. The reality is that even with respect to the oft-condemned TRIPs, there are supporting voices in the least-developed parts of the world. Indeed, today the least-developed state is often at one with the neo-liberal globalisation discourse that is articulated by powerful states, even as it protests this or that policy. In short, there is a need to think about the WTO in the language of social forces and classes. International institutions, as the French Marxist Poulantzas astutely noted, do not have powers of their own but ‘crystallise class powers’.³³²

³³¹ Khan, Farida C, note 245, p.32.

³³² Kamal, note 328, p. 86.

The core issue is not whether free-trade is good or bad, but whether free trade automatically translates into welfare for the subaltern classes. Thus, there is sufficient evidence to show that free trade does not necessarily mean poverty alleviation. For this to happen a range of national economic and social policies and institutions need to be put in place that are in turn supported by international development institutions in the matrix of an international right to development.³³³

However, this is not always possible, for the TCC does not merely establish the rules of WTO but also the policies of other international institutions, notably, the international financial institutions. Therefore, unless the WTO regime is located and given meaning in the matrix of the rapid changes that are appearing in international law and institutions at the behest of TCC, and more generally, in the matrix of the history of colonialism and neo-colonialism, the terms of reference of debate tend to be limited. The limitation is in that the failure to take into account the TCC excludes from view the activity around WTO agreements (e.g., the TRIPs Agreement) or outside them, through policies enforced by institutions like the World Bank and the IMF which, *inter alia*, sustain and strengthen the WTO propensity to promote TCC interests.

A holistic approach allows us to appreciate the diplomatic strategy of the TCC that often accommodates friendly interests in WTO in pursuit of the larger goal of realising its global interests in the realm of international finance and production. This is the reason

³³³ Maskus, Keith E. 'Competition Policy and Intellectual Property Rights in Developing Countries: Interests in Unilateral Initiatives and a WTO Agreement', p.29, <http://siteresources.worldbank.org/INTABCDEWASHINGTON2000/Resources/maskus.pdf>.

why increasingly, in the words of Panitch and Gildin, ‘the globalization of capitalism has left virtually no national bourgeoisies for labour to ally with and few divisions to exploit between finance and industry’.³³⁴

It is implicit in the argument just advanced that the subaltern classes do not set themselves against free-trade or the WTO *per se*. The abstract principle of free trade is therefore not the target of the historically contingent subaltern class hostility. Rather, hostility is directed at the shape of free trade. This hostility, the historically contingent subaltern critique, is rooted, first, in the historical fact that neither Great Britain nor the United States practised free trade while their economies were developing. Instead, the US industries were literally the most protected in the world until 1945. Secondly, this critique notes that even today, the principles of free trade are not allowed to prevail when it impinges on the interests of powerful social classes, the subsidies regime sustained by the Agreement on Agriculture (AoA) being a good example. It contends that the principle of free-trade is being deployed without serious justification to realise non-trade values such as environmental protection or core labour standards. More specifically, the critique is convinced that the promotion of free trade has little to do with the creation and enforcement of international property rights such as IPRs so fiercely protected by the TRIPs. Indeed IPRs *are* a form of protectionism.

Also, the WTO does not concern itself with significant trade problems such as those related to primary commodity trade, which is most often the staple trade of least-

³³⁴ Panitch, L and Gindin, S, 2004, *Global Capitalism and American Empire*, Merlin Press, pp.14-15.

developed countries. The World Commission on the Social Dimensions of Globalisation notes that:

... from 1980 to 2000 world prices for 18 major export commodities fell by 25 percent in real terms. This fall was particularly significant in the case of cotton (47 percent), coffee (64 percent), rice (60.8 percent), tin (73 percent) cocoa (71.1 percent), and sugar (76.6 percent).³³⁵

The reader might well wonder how plausible this obviously classic Leftist conspiracy theory is. Yet no-one should feel comfortable about dismissing it out of hand, for reason alone that it does address the question of why it is that the WTO regime includes no distributive justice mechanism, despite the fact that this regime of obligations constrains all member states, the differences among them in trade capacity notwithstanding.

3.9 Conclusion

This discourse began with a review of recent approaches to the definition of developing countries, and the conclusion that GDP per capita ranking was the only basis necessary to achieve a valid, objective definition, and that definition upon this basis is a necessary preliminary to the introduction of distributive justice into the WTO regime. In pursuit of its aim to demonstrate that the WTO effect on developing countries was such that WTO agreements benefited only those of them that were already highly trade-capable but harmed those that were not, the sizeable expansion of the UAE's service sector was cited first, alongside the observation that this was so despite shortcomings in this country's GATS-compliance. It was posited also that this instance of non-compliance is neutralised by US non-compliance with the MFN obligation of the GATS, *vis-à-vis* the Dubai Ports

³³⁵ Chiappetta, V, 'The desirability of agreeing to disagree: The WTO, TRIPS, international IPR exhaustion and a few other things', vol. 21, *Michigan Journal of International Law*, 2000, p. 338.

World showdown, and it was posited that MFN obligations may be politically untenable. The growth of Brazil's pharmaceutical industry was proposed to be the direct consequence of the TRIPs Agreement regarding patent protection. By contrast, Bangladesh saw the near-destruction of its RMG sector as the consequence of the ATC, and saved it only by becoming heavily indebted to the IMF.

International law was then canvassed for a 'right to development' obligation, and it was concluded that, despite the weaknesses of the supportive theories, that obligation exists pursuant to Articles 55 and 56 of the UN Charter, to which the WTO is subject. The Chapter 2 argument concerning the symbiotic nature of development and distributive justice was then recalled, and a workable distributive-justice mechanism proposed. That mechanism would distribute obligations, not benefits, along the spectrum of WTO member states, arranged according to their GDP per capita status. This obligations-distributing model was commended on the grounds that (i) the distribution of obligations is consistent with the 'differences' concept central to the distributive-justice theories, and (ii) it is a model particularly appropriate in the WTO regime, for that regime is a law of obligations, as Chios Carmody characterises it. It was conceded that distribution of obligations is an irredentist project, but argued that irredentism is justified in the face of US and EU failure to abide by the market-access agreements to which they committed in the Uruguay Round. The absence of any recognition in WTO law of the 'common but differentiated obligations' principle, an absence demonstrated by omission in the meticulous account Chios Carmody constructs of the nature of WTO law, was seen as firm ground for the proposal that justice demands the inclusion in that law of the

international distributive justice principle as the present writer has constructed it. SDT and GSP provisions are not working in the WTO, and are therefore not serving the distributive-justice function they might have been meant to serve. That they are not working was demonstrated in the account of Benin's and Chad's, and India's, DSB experiences, and with reference to Alavi's study of failed SDT invocations, and in the current non-law status of the GSP. Answer was sought to the question of why there is no recognition in the WTO regime of the common but differentiated bearing of the burden of WTO obligations, even to the minimal extent that the SDT and GST provisions mean to be that mechanism. It was concluded that there has been no attempt to advance an answer, except in terms of the Leftist theory that a TCC exists, and that it does not want such a mechanism.

Chapter 4 examines the TRIPs agreement for compulsory licensing of patent pharmaceutical products, and compares the very different effects these provisions have had on India, China, the UAE and Bangladesh. It will also point out the ill effects of the TRIPs that a distributive justice mechanism would nullify, or at least greatly ameliorate.

Chapter 4

The TRIPs and the Compulsory Licensing Problems of Developing Countries

4.0 Introduction

Before the adoption of the Doha Declaration,³³⁶ pertinently, of the relevant part of the text of its Article 6,³³⁷ it was more or less universally accepted that Article 5(A)(2) of the Paris Convention protects the fundamental right of member states to grant compulsory licences. (The compulsory licence is an instrument a state can use to act against a patent monopoly if doing so is in the public interest.) Articles 8 and 31 of the TRIPs have since ‘set in stone’ the conditions that determine the grounds of that grant. Whereas the Paris Convention’s provision is direct and simple,³³⁸ the TRIPs provisions are loose and inviting of efforts to minimise them. Not only that, but they also succeed to deprive least-developed countries of urgently needed medication. This Chapter will argue that the provisions of TRIPs regarding compulsory licensing enable the perpetration of abuses of human rights, albeit an unintentional enabling. It is true that Article 31 of TRIPs allows for the granting of compulsory licences in cases of abuse of patent-monopoly power, or when public interest demands it. But it is also true that developing countries rarely make

³³⁶ Doha Ministerial 2001, WT/MIN(01)/DEC/1, 20 November 2001, WTO website, http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#electronic.

³³⁷ ‘... We recognize that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements ...’

³³⁸ ‘Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work.’

use of this instance of TRIPs flexibility, and that least-developed countries are unable to make use of it. It will nevertheless be conceded that Colleen Chien³³⁹ makes a potentially valid point that the TRIPs provisions are a safeguard against the reduction of drug prices by compulsory licensing to the point where their cheapness inhibits innovation. But Chien's failure, like the failure of others who make the same point, is that she tenders no empirical evidence of the fact that there is a reduction in R&D when drugs become cheaper. She, like her fellow travellers, merely asserts that incentive for R&D investment reduces with the fall in price of drugs. This is so despite the fact that Scherer's account³⁴⁰ of the research into this subject (an account that appeared well before Chien's work) undermines that assertion quite drastically. The well-meant 2003 WTO decision on compulsory licensing is timely, and its recognition that least-developed countries need its flexibility is sound. But the WTO to date has not taken account of the fact that the amended Article 31 of the TRIPs has not rendered the compulsory licensing facility usable by least-developed countries. The human right to health is therefore far from being recognised and promoted by the TRIPs.

The special cases of China and India with regard to the TRIPs provisions for compulsory licensing will be examined, and on the basis of that examination, an argument will be propounded for the need for compulsory licensing provisions to be enforceable.

³³⁹ Chien, Colleen, 'Cheap drugs at what price to innovations: Does the compulsory licensing of Pharmaceuticals hurt innovation?', vol. 18, *Berkeley Technological Law Journal*, 2003, pp. 853-907.

³⁴⁰ Scherer and Watal, note 250, pp. 13 - 16.

4.1 The general nature of the TRIPs

Before setting out upon the main argument of this Chapter, it is expedient to sketch an outline of the nature of TRIPs. This sketch will take a seemingly irrelevant (to this Chapter's main argumentative intention) look at the TRIPs and its provisions concerning geographic indicators (GIs). The purpose in doing this is to call attention to the tremendous efficiency of the TRIPs in purely trade-related matters. In such matters it is almost facetiously precise, and its provisions are enforceable. It is instructive to compare this with the TRIPs approach to compulsory licensing.

The Trade Related Aspects of Intellectual Property Rights (TRIPs) Agreement was formulated during the WTO's Uruguay Round of talks in 1994. The TRIPs is regarded as the principal international treaty governing intellectual property rights (IPR). It has brought IPR protection firmly into the realm of international trade. This feat was not easy to bring off. The US had been displaying its dissatisfaction with the insufficient protection of intellectual property that the Paris Convention, and its Administrator, the World Intellectual Property Organisation (WIPO) afforded. The US aim was to transfer IPR discussions to the GATT forum. It was frustrated by a widespread sentiment that WIPO and not the GATT is the appropriate forum for the discussion of intellectual property. It was only in 1989, when Brazil and India consented to it, that IPR discussions were transferred to the GATT forum.³⁴¹ Its successor, the WTO, then assumed full control. The WTO tells us the following of what TRIPs does:

³⁴¹ Reiling, Ron, 'Intellectual Property Regimes for the Information Age: Policies of the United States, the European Union and the World Intellectual Property Organization', vol. 3, no. 9, *Boston University Journal of Science & Technology Law*, 1997, pp. 9 - 11.

The agreement covers five broad issues: (i) How basic principles of the trading system and other international intellectual property agreements should be applied, (ii) how to give adequate protection to intellectual property rights, (iii) how countries should enforce those rights adequately in their own territories, (iv) how to settle disputes on intellectual property between members of the WTO, and (v) special transitional arrangements during the period when the new system is being introduced.³⁴²

Every member of the WTO is under obligation to implement TRIPs in both letter and spirit. TRIPs provides for the registration and protection of patents and copyright, and determines the administrative aspects of copyright protection. The Agreement provides *inter alia* for the protection of computer programming innovations by categorising them as 'literary' works. (This protection most suits those countries whose development is strongly propelled by the information and communication technology sectors, particularly India and China, and those, notably the US, who are major exporter of entertainment-industry products.)

The Agreement provides also that WTO member countries must develop legislative frameworks regarding patent laws, especially so as to cover technological innovations and botanical discoveries that are considered related to the hard work of individuals and nations:

Provisions within the Agreement also demand that national protection for patents and copyright be limited. In terms of these rights, citizens should not receive favouritism from national governments.³⁴³

³⁴² World Trade Organisation, *Intellectual Property: Protection and Enforcement*' http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm .

³⁴³ Incorporated into the *Code de la Consommation* (Law No 93-949 of July 23, 1993, *Journal Officiel*, July 27, 1993, amended in 1994, *Journal Officiel*, January 4, 1994.

4.1.1 The TRIPs and its legislative and administrative requirements

The TRIPs is the first WTO agreement to place an obligation on members states to adhere to certain minimum standards in respect of the establishment of enforcement procedures, and to prescribe norms that are to be operative in their legal frameworks.

Although the TRIPs is mainly concerned with the negotiation of the IPRs: copyright, trademark and patent, its scope encompasses the regulation of competitive markets, measures for enforcement, settlement of disputes and transitional arrangements.³⁴⁴

Accession to the TRIPs Agreement is a pre-condition of WTO membership. This Agreement rests on the strength of the Dispute Settlement Understanding (DSU), the dispute settlement procedures of WTO. Supervision of TRIPs compliance is conducted by the Council for TRIPs, and at least tangentially, the WIPO, which is entrusted with a minor role in the supervision of some IPR matters.

4.1.2 GIs and an IPR-exploiting TRIPs

Even in its making, the nascent TRIPs had shown itself indifferent to any distinction of what is merely trade protection and what is intellectual property. This was almost comically obvious in the course of the debate about GIs and their protection,³⁴⁵ this debate having been included in the agenda for the Uruguay Round under the IPR rubric.

³⁴⁴ Course on Dispute Settlement in International Trade, Investment and Intellectual Property, <http://72.14.235.104/search?q=cache:A7dWKYIxLRYJ:www.unctad.org/TEMPLATES/Download.asp%3Fdocid%3D3492%26lang%3D1%26intItemID%3D2741+TRIPS&hl=en&ct=clnk&cd=6&gl=in&client=firefox-a>.

³⁴⁵ As definition of GIs is given in Article 22(1) of the TRIPs: 'Geographical Indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.' This definition places the characteristics of GIs and their protection squarely on the multilateral plain.

Article 22(2) of the Agreement requires WTO member states to:

... provide the legal means for interested parties to prevent [the use of any means] in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner that misleads the public as to the geographical origin of the good.³⁴⁶

The same article requires also the provision of legal means for the prevention of any use ‘which constitutes an act of unfair competition’. Further, it requires that members refuse or invalidate a trademark applied on the basis of a geographical indication with respect to goods that do not in fact possess the provenance claimed. This right to refuse is also available if the use of a GI in a trademark could be regarded as misrepresenting the good’s true place of origin.³⁴⁷

The TRIPs Agreement provides specific regulations regarding the GIs for wines and spirits. The rules prescribed under the Agreement prohibit the use of words such as ‘like’ and ‘type’ in order to prevent protected products being copied by competitors whose product does not have that GI. Similarly, there is a requirement for a registry for wines. So-called ‘grandfathering’ of an existing identical product of wine is also provided against in the regulations. One commentator observes that since wines and spirits are dealt with by a special clause, they should be given special treatment. They are different from other forms of IPRs protected under the TRIPs Agreement. Hence GIs for wines and spirits are properly provided a much more rigorous ‘super-protection’ from

³⁴⁶ World Trade Organization, ‘TRIPs: AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: PART II — Standards concerning the availability, scope and use of Intellectual Property Rights’, http://www.wto.org/english/tratop_e/trips_e/t_agm3b_e.htm.

³⁴⁷ Josling, Tim, ‘The War on Terror: Geographical Indications as a Transatlantic Trade Conflict’, vol. 57, issue 3, *Journal of Agricultural Economics*, 20 September 2006, pp.339 – 341.

competition than the protection that is afforded to other products.³⁴⁸ (One hopes that there is at least a little irony in this argument. But one cannot be sure.)

Article 23, entitled ‘Additional Protection for Geographical Indications for Wines and Spirits’, provides for refusal, or automatic invalidation, of the registration of a trademark for wines or spirits that possess a GI erroneously or falsely identifying them as wines or spirits from a certain place. This could be done via domestic legislation (if it provides for such), or at the request of an interested party who complains that those wines or spirits do not possess the true GI of the place of origin applied for.

Under Article 23 of the Agreement, the wine and spirits industry is endowed with a discreet sub-system of trans-national protection. Under this scheme of regulation, the following steps are prescribed: (i) The establishment of a voluntary multilateral system of registration and notification of the GIs for wines and spirits eligible for protection, and (ii) a protection of the utmost magnitude against the use of GIs to provide misleading information to consumers.

Pursuant to Article 23(1), WTO members are given the power to extend legal assistance to the producers of wines and spirits to protect their products against unauthorised use of the GI for promoting goods which do not originate from the location indicated by the GI. The Agreement also provides for the refusal or cancellation of trademarks, including the GIs, either by member nations or upon the claim of an interested party. This provision,

³⁴⁸ Hennessey, William 2005, *Holy Spirits*, Part I, <http://www.ipfrontline.com/depts/article.asp?id=2003&deptid=6>.

based on Article 3 of the Lisbon Agreement, includes indications that make reference to the source of these goods when the GI is used in translation, or when the GI is referred to with expressions such as ‘kind’, ‘type’, ‘style’, ‘imitation’, and so on.³⁴⁹ The high level of exclusive protection offered to wines and spirits implies a beefed-up protection for trademarks generally, for it becomes an infringement if a GI is put to use for the promoting of a product that is not a wine or spirit, if that promotion might be deemed to result in the lowering of the reputation of the wine or spirit.³⁵⁰

4.1.3 General protection against unfair competition for all products

Unlike wines and spirits, agricultural products, foodstuffs and handicrafts do not enjoy any ‘extraordinary’, ‘high-level’, or ‘special’ protection. Moreover, there is no provision for any multilateral register. Consequently, these products’ trademarks are prone to infringement. However, provisions have been made to prevent any unauthorised use of GIs to misrepresent or provide deceptive descriptions. Article 22.2, while codifying the existing international protection against unfair trade practices, provides for the prohibition of any use which represents an act of unfair competition as defined under Article 10*bis* of the Paris Convention.³⁵¹ The TRIPs Agreement extends the coverage of Article 10*bis* to specifically cover the case where a GI which,

although literally true as to a territory, region or locality in which the goods originate, falsely represents to the public that the goods originate in another territory.

³⁴⁹ Evans, GE, and Blakeney, Michael, ‘The Protection of Geographical Indications After Doha: Quo Vadis?’ vol. 40, issue 1, *Journal of International Economic Law*, 2006.

³⁵⁰ ‘Applying Belgian law on geographical indications and fair trade practices, the Nivelles Commercial Court ordered SA de Landtsheer Emmanuel to cease using the word “Champagne” in relation to its new product, as well as the slogan ‘the beer world’s answer to Veuve Cliquot’ (RG A/02/01496,2003). See Evans and Blakeney, *ibid*.

³⁵¹ Products in the category of mineral water and spring waters are regulated by the Council Directive 80/777/EEC dated 15th July 1980.

Apart from the above provisions, Article 22(2) requires that the protection offered under Articles 22(1) to 22(3) to goods other than wines or spirits must be extended to cover all the GIs attached to products that are deceptively similar to the original products but falsely represent to consumers that they originate from the territory indicated. It must be noted, however, that such protection is not comparable to the high-level protection being offered to wines and spirits. The valid registration and administration of a trademark professing to have a specific GI thus depends on its use not being misleading. Under Article 22.2, the registration of trademarks for goods not emanating from the location indicated must be refused or cancelled because this represents a deception of, or misinformation given to, consumers.

4.2 A quick overview of the concept ‘compulsory licensing’

The compulsory licensing scheme applies to pharmaceutical products, and, like all TRIPs provisions, it must be implemented by WTO members. Compulsory licensing vests national governments with the power to insist that a patent-right holder relinquish his rights to another manufacturer who has been granted government permission to produce and sell his product. The government concerned fixes the amount of compensation payable to the right-holder, and sets the life-time of the compulsory licence. Compulsory licensing is legal, pursuant to TRIPs provisions, in a variety of circumstances. These circumstances include some loosely defined ‘national interest’ requirements.³⁵²

³⁵² Buchner, Sara, ‘*Trade Briefs: Compulsory Licensing*’, Trade Law Centre for South Africa, <http://www.tralac.org/scripts/content.php?id=19>.

The TRIPs Agreement has enabled developing countries to make use of compulsory licensing, provided that their respective governments pay appropriate and adequate compensation to the patent holder. Article 8.1 of the Agreement provides that:

Members may in formulating or amending their laws and regulations adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development.

Article 31 of the Agreement, entitled ‘Other Use Without Authorisation of the Right-holder’, provides that:

Where the law of a Member allows for other use of the subject matter of a patent without the authorisation of the right holder, including use by the government or third parties authorised by the government, the following provisions shall be respected...

Several conditions are stipulated, one being that the original patent-holder must receive royalties from the holder of the compulsory licence.

Compulsory licensing is meant to ensure that medicaments are available at comparatively low prices in developing countries when those medicines are ‘necessary to promote public health’. The compulsory licensing privilege of, for instance, South Africa, is well protected by Article 1 of the Agreement against opposition by, for instance, the US. This Article provides that the members of the WTO are obliged to ‘give effect to the provisions of this Agreement’. There is therefore no choice but to give effect to Articles 8 and 31. Choice obtains only in the matter of ‘implement[ing] in their law more extensive protection than is required by this Agreement’. And it is this choice-proffering provision

of TRIPs that succeeds to be the ammunition that kills off the possibility of least developed countries' benefiting from the compulsory licensing facility of TRIPs.

4.2.1 The WTO decision on compulsory licensing

On 30 August 2003, the WTO ratified a set of new rules with a view to improving the access of developing countries with severe public health problems to patent medicines.³⁵³

The rules have since been implemented to amend Article 31 of the TRIPs. This was the WTO's response to the by-then-widespread indignation that the TRIPs rules were themselves constructing obstacles to least-developed countries' access to essential medicines. This marked the first ever, and so far the only, amendment of a WTO agreement.

The WTO's 30 August 2003 decision inserted three waivers of the provisions of Article 31(i): the provision of 31(f) that compulsory licensing rights are to be deployed for supply of the domestic market only; ii) the provision of 31(h) that the country importing under compulsory licensing must remunerate the original patent holder; and (iii) the provision of 31(f) that prohibits the export of pharmaceuticals imported under compulsory licensing. (The latter waiver now permits the re-export of pharmaceuticals, so long as their destinations are confined to members of a regional trade agreement, and if at least half of those members are least-developed countries.)

³⁵³ WTO General Council Decision, 'Implementation of Paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health', WT/L/540, 30 August 2003, http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm.

But there is a hitch. The new rules must be implemented at national level before they can be acted upon. And implementation of them is fully voluntary. The only exporting (of pharmaceuticals) WTO member countries to implement them so far are Canada, India, Norway and the EU. China and Korea have introduced some changes in their domestic legislation, but have not formally notified the WTO of them.³⁵⁴ No instance of importation under the new rules by developing countries has yet occurred, nor is there evidence to date that potential importing countries have modified their domestic law to include the new Article 31 amendments.³⁵⁵

4.2.2 Opposition to compulsory licensing

Theorists who have given expression to views that condemn the concept of compulsory licensing argue along the following lines: It cannot be expected to have a positive impact on pharmaceutical prices. This legal phenomenon inhibits pharmaceutical companies' incentive to introduce new medicines. Although the TRIPs Agreement addresses some specific issues relating to compulsory licensing, it does not offer a sufficient level of legal certainty, thereby creating a larger risk of litigation. Since compulsory licensing confers the right to produce or import a product without the express consent of the original patent-holder, members' domestic licensing laws properly attempt to inhibit the use of compulsory licensing.

³⁵⁴ Nottage, Hunter and Sebastian, Thomas, 'Giving legal effect to the results of WTO trade negotiations: An analysis of the methods of changing WTO law', vol. 9, no. 4, *Journal of International Economic Law*, 2006, p. 993.

³⁵⁵ Musungu, Sisule F, and Oh, Cecilia, 'The use of flexibilities in TRIPs by developing countries: can they promote access to medicines?', the South Centre in collaboration with the World Health Organization, 2006.

Considerably more substantive than the criticism of compulsory licensing just outlined is the set of criticisms that take the WTO to task for the laxity of the TRIPs provisions for it. A major criticism of this kind is that the TRIPs completely neglects to regulate selling practices and licensing restrictions. As Keith Maskus³⁵⁶ notes, that leaves IPRs open to exploitation by the cartelisation of horizontal competitors through licensing agreements that fix prices, limit output or divide markets. Cartels might also acquire exclusive rights to products and technologies that began their patent or compulsory-licence life as competitors. TRIPs has not made a point of closing off loopholes for the abuse of compulsory licences. In view of the exhaustively-worked provisions for the protection of GIs regarding wine that was outlined above, the GATT panel responsible for this neglect deserves censure.

A common claim is that TRIPs has not been effective at reducing the price of pharmaceuticals sufficiently to enable developing countries to manufacture and sell them. On the contrary, the prices of patented medicines have been allowed to soar, for the TRIPs has left pricing completely unregulated.³⁵⁷ A related criticism is that pursuant to TRIPs there is a twenty-year minimum patent protection period for pharmaceutical products and processes. This long protection period amounts to a grant of secure monopolies to manufacturers of pharmaceuticals, enabling them to eliminate competition from alternative, low-cost producers.

³⁵⁶ Maskus, note 333, pp. 28 - 29.

³⁵⁷ Abbott, Frederick M, 2006, 'The cycle of action and reaction: developments and trends in intellectual property and health, in Roffe, Pedro, Tansey, Geoff and Vivas-Eugui, David (eds), *Negotiating health: Intellectual property and access to medicines*, International Centre for Trade and Development, pp. 28-29.

4.2.3 Gainsaying the detractors of compulsory licensing

Returning to the detractors of compulsory licensing who would prefer that this provision not exist: Colleen Chien³⁵⁸ stops short of a categorical claim that compulsory licensing effects innovation in medical products seriously. (She does, however, insinuate the possibility as hard as she reasonably can.) But she does claim categorically that it has a marked tendency to reduce R&D funding. As already noted, her documentation of this claim is so thin as to be almost absent.

Her case rests on the somewhat tortuous argument that it is the developed-country markets for HIV/AIDS and cancer-treating drugs that subsidise those countries' pharmaceutical companies' R&D. Global R&D is therefore not hampered by compulsory licences, but it would be if drugs produced under compulsory licence were to find their way into developed-country markets.³⁵⁹ Quite where she culls this threat from is unclear. After all, according to the World Health Organisation, there is very little private financing of research into these diseases,³⁶⁰ so it is not pharmaceutical companies who are expending their profits on developing them.

It is sad to read a debunking of compulsory licensing at any time, but decidedly pathetic when that debunking is reduced to relying on imaginary threats. After all, the rationale of compulsory licensing is inextricably allied to making available life-saving medicines to people in least-developed countries who cannot possibly afford to buy them at developed-

³⁵⁸ Ibid.

³⁵⁹ Chien, note 339, p. 1-57.

³⁶⁰ World Health Organisation, 'Public health, innovation and intellectual property rights', Commission for Intellectual Property, Innovation and Public Health, 2006, p.25.

world prices. And it is as well to keep in mind that the WTO has a serious human rights commitment: As Pogge³⁶¹ and numerous others have noted, the first preamble to the Marrakech Agreement cannot but be read as such a commitment. Furthermore, the Doha Declaration re-affirmed this commitment unequivocally:

We recognize that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements.³⁶²

It is difficult to understand why Chien expresses reservation about the effort that the WTO has at last made (with the 2003 Decision concerning compulsory licensing) to take account of the right to life of disease sufferers in least-developed countries. Scholars are by-and-large guarded about pronouncements in a field already well covered, unless they can make a mark on that field. In this case, Chien has not even dented the enormous contribution to the field that Professor Scherer has made.

Susan DeSanti³⁶³ constructs an excellent summary of that. Her summary is well worth quoting at length, for not only is it a comprehensive and lucid representation of Scherer's massive contribution to the patent-protection argument, but it makes clear that Scherer had disposed of the 'compulsory licensing' criticisms that would have it that this facility somehow harms the pharmaceutical industry well before those criticisms became

³⁶¹ Pogge, T, 2002, *World Poverty and Human Rights*, Polity Press, p. 2.

³⁶² Doha WTO Ministerial, note 336, para. 6.

³⁶³ DeSanti, Susan, 'The Intersection of Antitrust and Intellectual Property Issues: A Report from the FTC Hearings', Federal Trade Commission Website, 2 February 1996, <http://www.ftc.gov/speeches/other/desanti1.shtm>.

fashionable responses to the lead-up and aftermath of the 2003 WTO Declaration.

DeSanti summarises Scherer's research thus:

Testimony by Professor FM Scherer of Harvard University discussed studies that have examined, in various ways, the extent to which incentives derived from patent protection actually are the primary motivators of innovation efforts. Such studies generally assessed the value of patents in inducing initial innovation. Interestingly, the results of several studies have shown that the majority of industries do not consider patents to be very important assets ... Professor Scherer also cited a 1986 study by Edwin Mansfield, who, in a survey of firms from 12 industries, found that only 14 percent of innovations overall (in a period from 1981-83) would not have been developed without patent protection ... Professor Scherer concluded that large corporations have many incentives, other than the potential for patent protection, to engage in research and development. He characterized the most basic incentive as: 'If you don't keep running on the treadmill, you're going to be thrown off'. He offered the caveat, however, that 'the spectacular successes that sometimes come from patented products may provide a sort of demonstration effect and lure to other smaller firms that would like to make it big.' This means that the distribution effect of rewards to technical innovations will be highly skewed, because 'a relatively few winners offset the losses of large numbers of losing R&D investments'. ... Professor Scherer agreed that the creation of the Federal Circuit has led to important, substantive changes in the law – changes, he argued, that were not intended by Congress. As a result, he reported, patents have been strengthened greatly, and firms are recognising that a good patent is a powerful instrument to have. The impact of this change in the legal environment is that smaller firms, and even some rather large firms trying to develop a new product, are essentially finding themselves in a mine field, according to Professor Scherer. He suggested that 'there are lots of unexploded patents out there, and you might step on one and have your corporate leg blown off' ... Professor Scherer discussed the results of various studies that he conducted to determine the competitive effects of compulsory licensing. In assessing the effects of antitrust consent decrees in the 1940s and 1950s that subjected many companies to compulsory licensing of patents, Professor Scherer's findings indicated that compulsory licensing had only a very minor negative effect on follow-on innovation. His studies reflected some of the following findings. First, the vast majority of firms reported that the compulsory licensing decrees had, at most, a very minor negative impact on their R&D investments. However, there was a statistically significant decline in patenting by firms subjected to compulsory licensing decrees, especially for those that had to license future as well as past licenses. Instead, the firms who sought fewer patents relied on secrecy to protect their inventions. Finally, with a few significant exceptions, compulsory licensing decrees generally did not result in any changes in market structure, leading Professor Scherer to question the extent to which such decrees actually remedied competitive problems. Professor Scherer did observe that extensive compulsory licensing of patents in the 1940s and 1950s did not

prevent the US from enjoying a period of extraordinary productive growth during the 1950s and 1960's.

It is not easy to see why Chien and others feel free to proceed with their reservations about the effect of compulsory licensing on pharmaceuticals innovation, etc., without first disposing of Scherer's firmly founded empirical findings. It does appear that Scherer disposed of the 'adverse affect of compulsory licensing on the pharmaceutical industry' debate even before it began. Nobody, particularly not scholars, should be allowed to forget this.

4.3 Compulsory licensing and India's pharmaceutical industry

It is curious that the pharmaceutical industry actually benefited from the latitude that the Paris Convention had allowed to the compulsory licensing facility. Admittedly, the benefit did not accrue to the US pharmaceutical giants. Rather, it accrued to India's. The spectacular success of India's pharmaceutical industry is owed largely to the fact that before the advent of the TRIPs, it had no domestic legislation regulating the protection of pharmaceutical patents, nor, thanks to the then-dominant Paris Convention regarding it, did anyone have the means of forcing a domestic legislation on this country.

With the advent of TRIPs, India made clever use of its Article 65.4, which allows developing countries a transition period for TRIPs compliance. (This transition period for

pharmaceuticals expired in 2005).³⁶⁴ Having obtained a long transition period, India was able to operate without TRIPs constraint until January 2005. In the interim, it had developed a large industry in generic medicines, having been left free to practise the reverse engineering and copying of medicines patented.

India's pharmaceutical industry has one further TRIPs benefit. That exists pursuant to the Article 70 'mailbox' provision for filing patent applications after 1995. India is now TRIPs compliant, so it can apply to its patent office for a grant of a patent that would enable it to continue producing generic medicines for the remainder of the original patent's twenty-year life. That means that India can rely on its off-patent behaviour well beyond 2005.

However, India is not a least-developed country, so no further direct benefit can accrue to it from the TRIPs provisions regarding compulsory licensing. Or so it appears. In fact, one cannot but wonder what will happen in least-developed countries, and in some developing ones, when the supply of cheap generic medicines by India begins to dry up. The hole that will develop in the global supply is enormous, for the Indian pharmaceutical industry currently occupies 1.5% of the value of the global pharmaceutical market, and supplies 20% of the global consumption. It produces 22% of all generic medicines worldwide. Together with China, India produces a lot of active pharmaceutical ingredients and is a major supplier of vaccines.³⁶⁵ Furthermore, almost half of the India's pharmaceutical exports go to developing and least-developed

³⁶⁴ TRIPs Article 65(2) and (4).

³⁶⁵ Grace, Cheri, 2004, 'The effect of changing intellectual property on pharmaceutical industry prospects in India and China', DFID Issues paper: Access to Medicines, June 2004, p.14.

countries.³⁶⁶ Clearly, the TRIPs does not provide for a future reduction of the medicine supply from India. Will the WTO be moved to allow India's pharmaceutical industry to live outside TRIPs regulations? It will have to do something to soften its pharmaceutical-patents regime if it is to avert a health crisis in the poor developing countries, not to mention the least-developed ones.

4.4 The People's Republic China and the failure of compulsory licensing

China did not accede to the WTO until 2001, and was not TRIPs-compliant until the end of 2002. However, China had been forced by the US (the latter threatening action under its 'Special 301 Report', pursuant to section 182 of the Trade Act of 1974)³⁶⁷ to amend its patent legislations as early as in 1992, and to establish the mailbox system to retrospectively protect foreign patents obtained between 1984 and 1993.³⁶⁸ China was therefore without the opportunity of the off-patent behaviour that India capitalised on to develop her generic-medicines industry. That, however, had one good outcome:

Entrance into the WTO compelled China to enforce IP protections. A number of high-profile actions against it made TRIPs compliance unavoidable. For instance, in October 2003, Glaxosmithkline blocked a number of Chinese pharmaceutical manufacturers' requests for a licence to produce Avandia, a type-2 diabetes treatment. That shifted the

³⁶⁶ Médecins Sans Frontières, 'Examples of the importance of India as the "pharmacy for the developing world"', 29 January 2007.

³⁶⁷ Newby, Kim, 'The Effectiveness of Special 301 in Creating Long Term Copyright Protection for U.S Companies Overseas', vol. 21, no. 3, *Syracuse Journal of International and Comparative Law*, 1995.

³⁶⁸ Mastel, Greg, 'China and the World Trade Organization: Moving Forward without Sliding Backward', *Law and Policy in International Business*, Spring 2000.

focus of the Chinese pharmaceutical industry off the manufacturing of generic medicines and on innovative production of biotechnical drugs and their independent patenting.³⁶⁹

A major problem, however, one that Médecins Sans Frontières has publicised,³⁷⁰ is China's large HIV/AIDS-infected population, and the absence of a safe domestic product for its treatment. China has amended its patent law to activate the new compulsory licence provisions of TRIPs, but to date no compulsory licence application has registered. JA Tanner surmises that China's reluctance to use the TRIPs compulsory licensing facility is due to fear of trade backlash from the United States.³⁷¹ He notes that 'such restrictions on compulsory licensing have recently been noted by the United Nations in relation to US trade policy'. His opinion is corroborated by the *Hong Kong Medical Journal*.³⁷²

It is trite to note that the post-2003 flexibility of TRIPs with regard to compulsory licensing is pointless if the WTO is not prepared to support it with provisions against trade bullies, and not less trite for noting that no provision of this kind could possibly be implemented. Nevertheless, in the Chinese case, it is more than obvious that WTO largesse in softening patent restrictions with its 2003 compulsory-licensing amendment is vacuous if the compulsory licensing facility remains unusable by the most needy. Sadly, the Chinese experience of its vacuity is not unique: Médecins Sans Frontières has had

³⁶⁹ Jia, H, 'IP litigation in China could drive innovation', 22 *National Biotechnology*, 2004, p.367-368.

³⁷⁰ Doctors and Society, 'WTO TRIPS and its effect on the supply and development of medicines in China', vol. 12, no 1, *Hong Kong Medical Journal*, February 2006, pp. 84-86, http://www.hkmj.org/article_pdfs/hkm0602p84.pdf.

³⁷¹ Tanner, JA, 'WTO TRIPS and its effect on the supply and development of medicines in China', Department of Biochemistry, Faculty of Medicine, University of Hong Kong, http://www.hkmj.org/article_pdfs/hkm0602p84.pdf.

³⁷² *Hong Kong Medical Journal*, vol. 12, no. 1, February 2006, p.86.

even worse experiences of it in Ghana and Rwanda, and they vehemently blast it for being unworkable.³⁷³

4.5 What good the Doha Declaration and the 2003 WTO Decision?

What immediately strikes a surveyor of the legal status of compulsory licensing is that there is an unwarranted assumption to the effect that the 2001 Doha Declaration on TRIPs and Public Health began the process of facilitating least-developed countries' access to life-saving medicines, and that the 2003 WTO Decision completed it by implementing the Doha Declaration to amend Article 13 of the TRIPs: 'Implement' would, surely, in some part of its sense-making rationale, include the notion 'make workable'. True, the Doha Declaration made clear an intention to ensure a working capacity. Its Article 6 charges the Council for TRIPs with that task:

6. We recognize that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPs Agreement. We instruct the Council for TRIPs to find an expeditious solution to this problem and to report to the General Council before the end of 2002.

It is also true that Article 8 of the 2003 WTO Decision provided for the monitoring of the working condition of the amended Article 13 of the TRIPs:

8. The Council for TRIPs shall review annually the functioning of the system set out in this Decision with a view to ensuring its effective operation and shall annually report on its operation to the General Council. This review shall be deemed to fulfil the review requirements of Article IX:4 of the WTO Agreement.

³⁷³ Médecins Sans Frontières, 'Neither expeditious nor a solution: the WTO August 30th Decision is unworkable. An illustration through Canada's Jean Chrétien "Pledge to Africa"', paper prepared for the XVI International AIDS Conference, Toronto, August 2006.

Glaringly obvious, however, is that the Council for TRIPs has not exerted itself in this direction. It met most recently on 13-14 March and 17-18 June 2008.³⁷⁴ Its previous meetings since 2003 made not the slightest disclosure about what the Council for TRIPs thinks of the working health of the compulsory-licensing amendments. One must hope that the now-well-publicised Médecins Sans Frontières claim that it is not working at all will not have eluded the Council's attention. But one is nevertheless at a loss to know what the Council might do to enable the working of compulsory licensing against the US's Special 301 law.

It is well known that Special 301, which exists pursuant to section 182 of the Trade Act of 1974, is a formidable trade weapon for inhibiting applications for compulsory licensing, even when those applications are fully TRIPs compliant. On the authority of Special 301, the United States Trade Representative (USTR) annually reviews US trading partners' intellectual-property-protecting behaviours, and 'lists' those whom it deems to be giving inadequate protection to US intellectual property. It then requires the offending countries to rectify their behaviours, and threatens trade sanctions on their failure to do so. Thailand, for instance, made it to the USTR's 'priority watch list' for issuing three compulsory licenses on two HIV/AIDS and one heart disease medicines. All three issuances were TRIPs compliant.

The TRIPs is helpless against this instance of the blatant undermining of its provisions concerning compulsory licensing. The undermining is so blatant that the US Senate has

³⁷⁴ Intellectual Property Watch, 'WTO TRIPs Council To Meet Amid Broader Negotiation Backdrop', 13 June 2008, <http://www.ip-watch.org/weblog/index.php?p=1098>.

itself passed a resolution to the specific effect that Special 301 should not be invoked to undermine the 2003 Doha Declaration concerning compulsory licensing:

Resolved, That it is the sense of the Senate that the United States should:

- (1) honor the commitments the United States made in the 2001 World Trade Organization Doha Declaration on the TRIPs Agreement and Public Health, which allows member states of the World Trade Organization to use 'to the full' the flexibilities in the Agreement on Trade-Related Aspect of Intellectual Property Rights (in this resolution referred to as 'the TRIPs Agreement') 'to protect public health and, in particular, to promote access to medicines for all,' including the issuance of compulsory licenses on grounds determined by member states;
- (2) not place countries on the 'Special 301' Priority Watch List under section 182 of the Trade Act of 1974 (19 U.S.C. 2242) for exercising the flexibilities on public health provided for in the TRIPs Agreement, such as issuing compulsory licenses to obtain access to generic medicines in accordance with the Doha Declaration;
- (3) not ask trading partners who are developing nations to adopt measures to protect intellectual property rights that relate to public health in excess of protections required in the TRIPs Agreement; and
- (4) support new global norms for promoting medical research and development that seek to provide a sustainable basis for a needs-driven essential health agenda.³⁷⁵

It is suspected (as noted above) that Special 301 is the likely cause of the inertness of China's compulsory licensing laws, and presumably of the least-developed countries' comprehensive failure to make use of them. Yet the entire TRIPs legislative framework is without any provision that might serve to protect the Doha Declaration on compulsory licensing, and the consequent 2003 WTO Decision to amend Article 31 of the TRIPs, against the depredation of even the signatory states. Not even the above US Senate resolution, which in a normal legal context would serve as an admission to a US breach of an international law, can have the slightest force in the WTO. Despite this striking lacuna, no-one has to date expressed hope that it might be remedied, nor yet faulted the

³⁷⁵ Senate Resolution 241/House Resolution 525, 110th Congress, 1st Session, In the Senate of the United States, (House of Representatives) June 20, 2007 (June 28, 2007).

Agreement for it, on purely legal grounds. ('Lacuna' is no doubt used eccentrically in the TRIPs 'compulsory licensing' context, given that this is a context in which the key is voluntary implementation of enabling legislation. That is, member states may, but need not, enact enabling legislation. It is therefore not the binding-law context in which 'lacuna' is typically identified. The term is nevertheless used, and used provocatively, in anticipation of the argument that follows to the effect that the compulsory-licensing provisions of the TRIPs should be binding law if they are to be at all consequential.)

Indeed, scholarship is weak, here. Even Intan Ramli's otherwise excellent and informative work³⁷⁶ totally neglects the lacuna identified above (and the whole compulsory licensing issue to boot). Yet it would have added grist to the mill of his argument that the WTO does not live according to the rule of law.

4.5.1 Ramli, the WTO and the rule of law

It is only reasonable to admit that, as its title declares, Ramli's work regards the WTO's dispute settlement procedures, and that therefore his excellent account of the meaning of 'the rule of law', and his conclusion that the WTO's dispute settlement mechanism (DSU) lives not 'by the rule of law' but 'by rule *by* law',³⁷⁷ does not handle the 'not really law' sorts of voluntary domestication on which the TRIPs puts the compulsory licensing facility.

³⁷⁶ Ramli, Intan Murnira, 2008, *Development and the Rule of Law in the WTO: The Case for Developing Countries and Their Use of Dispute Settlement Procedures*, Cameron May.

³⁷⁷ Ibid. p.148.

Even so, Ramli's work provides this thesis writer an inroad into the argument that the WTO Decision on compulsory licensing should be comprehensive law not made weak-kneed by voluntary compliance with its adoption into domestic law. First of all, there is no justice to be had by the very group of people (those who are in grave need of medication in developing and least-developed countries) whom the Doha Declaration and the 2003 WTO Decision aimed to help. This is so because no binding law exists to confer on them a right to expect all WTO member states with capable pharmaceutical industries to respond to their action under the TRIPs compulsory licensing facility. That is, the TRIPs does not make it binding upon member states to have in place a response to a compulsory-licensing request. And without binding law, there is no access to justice, or, put another way, there is no justice where there are no enforceable rights. (Ramli approves this insight into what contributes to the desirable condition of international law in which the 'the rule of law' obtains.)³⁷⁸

The most needy would-be beneficiaries of the TRIPs regime on compulsory licensing in fact have no enforceable rights: Since patent-holder countries may but need not cooperate with a request for an issuance of a compulsory licensing right, no law gives them rights, the denial of which they can take to an arbitrator, thus certainly not to the WTO's dispute settlement mechanism. Those most-needy would-be beneficiaries are the denizens of countries that do not have a pharmaceuticals-producing capacity, and are therefore reliant on another country's producer for importation rights.

³⁷⁸ Ibid. p.118.

Now, if Ramli is right (and he palpably is), ‘in the context of the WTO, the law is in the agreements’.³⁷⁹ But what if, as is the case with the TRIPs Agreement, an item of an agreement (in this case, the ‘compulsory licensing’ item) does not have the status of law? Therein, this thesis writer proposes, is the lacuna that excludes the possibility of justice for the very people the WTO Decision meant to benefit.

The above is no game in legal sophism. Instead, it is light cast upon a stark reality: Nothing in the TRIPs provisions regarding compulsory licensing exists to give, say, Ghana, any power to constrain, say, Canada, to give it patent rights for importing medication that Ghana sorely needs. As Médecins Sans Frontières point out, they attempted to gain medicines in Canada under compulsory licence pursuant to that country’s Bill C-9 (the 2004 Jean Chrétien Pledge to Africa legislation).³⁸⁰ Although they went through the formidable application process that the TRIPs and Canadian domestic legislation together made necessary, and even though a Canadian manufacturer of generic medicines expressed interest in providing the medications sought, the outcome was that Médecins Sans Frontières had to abandon the quest and turn to India. They point out also that since the ‘August 30th Decision, not a single drug has reached a single patient under the WTO mechanism’.³⁸¹

This proves not only the point of Médecins Sans Frontières that the TRIPs provisions regarding compulsory licensing are not working. It is also an illustration that not even a body as resourceful and influential as they are can do a thing about it. Now, if the

³⁷⁹ Ibid. p. 122.

³⁸⁰ Médecins Sans Frontières, note 373, p.2.

³⁸¹ Ibid.

compulsory licensing provisions of TRIPs had the same coercive force that its prescriptive provisions regarding GIs have, then the country on whose behalf Médecins Sans Frontières had applied to Canada might have taken Canada before the WTO DSM, with Médecins Sans Frontières as *amicus curiae*. But, as the case is, the TRIPs gives an avenue to justice to GI grievances, but none at all to compulsory-licensing grievances. *Ergo*, compulsory licensing is not governed by the rule of law.

4.6 Fringe cases and their differences: compulsory licensing in the UAE and Bangladesh

It is of significance that there has been no excitement about either the UAEs' or Bangladesh's TRIPs compliance with regard to compulsory licensing, despite the fact that the UAE is not yet fully compliant, and Bangladesh is a producer of generic medicines and is yet to become TRIPs compliant.

In the UAE, a new Patent Law was enacted 1992. Its Article 6.2 grants specific exemption from patent protection to medicines and pharmaceutical compounds. Ineffective process patents are the only available protection. Also, compulsory-licensing provisions are not yet fully TRIPs compliant.³⁸² This has not drawn a great deal of attention, for the simple reason that the UAE market is affluent, and not in need of acquiring patents under the compulsory licensing provision. Simply, the people of the UAE pay for patent medicines.

³⁸² United Arab Emirates, 'Intellectual Property Protection', <http://www.cptech.org/ip/health/phrma/nte-99/uae.html>.

In Bangladesh, the *Provisions of the Patents and Designs Act 1911* and its amendments and the *Patents and Designs Rules 1933* do provide for patent protection. However, that protection applies only to the process of producing pharmaceutical products, not to patented products.³⁸³ That leaves the law well short of being TRIPs compliant. The local industry imports ingredients, and manufactures and re-brands them for sale on the domestic market. But that has had little or no consequence: The Bangladeshi medicines market is weak, so foreign companies express no real interest in supplying it. Local low-cost producers of medicines without R&D capabilities are left alone to do their work. There is therefore no pressure on the country to become fully TRIPs compliant, other than from the WTO itself, with its extension to 2016 of the compliance period for least-developed countries. It is also true that the local manufacturers of pharmaceuticals do not have reverse-engineering capacity, and therefore pose no serious threat to holders of patents.³⁸⁴

Even if this country were to develop a reverse-engineering capacity, it is prevented from fully exploiting its eligibility, as a least-developed country, for SDT that would enable it to copy patent medicines for its own consumption and for export. As Ara Begum Ferdaus et al. point out,³⁸⁵ under pressure from the major pharmaceutical companies, the government of Bangladesh issued an executive order that the Department of Patents, Designs and Trademarks store all patent applications under the ‘mail box’ clause³⁸⁶ of the

³⁸³ *Patent and Designs Act 1911*, s. 3(e).

³⁸⁴ Van Duzer, Tony ‘*TRIPs and the Pharmaceutical Industry in Bangladesh: Towards a National Strategy*’, <http://www.cpd-bangladesh.org/publications/op/op24.pdf>.

³⁸⁵ Ferdaus, Ara Begum, Uddin, Mesbah and Khan, Sharifa, ‘Assessing Technical Needs for Implementing the TRIPs Agreement in Bangladesh’, presentation to the Ministry of Industries, Dhaka, 22 January 2009.

³⁸⁶ Article 70(8) of the TRIPs makes the ‘mail-box’ provision for filing patent applications for pharmaceutical and agricultural chemical products during the transitional period before a countries

TRIPS without dates, until Bangladeshi law becomes TRIPs compliant when the extension period for least-developed countries' compliance ends on 1 January 2016. This was so despite the fact that Bangladesh's Patents and Designs Act 1911³⁸⁷ has not yet been amended to give effect to the TRIPS compulsory licence provisions and the mailbox clause. That effectively stymied the Department of Patents, Designs and Trademarks as assistant to the country's manufacturers of generic medicines.

To further distance the possibility of SDT help here, Bangladesh has, in pursuit of investors and market access, signed two bilateral trade agreements³⁸⁸ that impose TRIPS-plus protections of patent pharmaceuticals. Carlos Correa notes that these were costly moves, for they carry the risk of patent terms extended to twenty years, of prohibiting the use of test data on efficacy and safety of drugs in applications for approval to manufacturing generic products, and in some cases, the limiting of the grounds upon which compulsory licences can be issued.³⁸⁹ David Lea concurs, and adds that the TRIPS-plus demands of bilateral trade agreements work directly against the Doha Declaration's resolve to protect public health interests.³⁹⁰

domestic laws become TRIPS compliant. The 'mail-box' provision is intended to ensure that the country concerned makes available a means by which patent applications for inventions can be filed and dated.

³⁸⁷ Act II of 1911, *Bangladesh Code* Vol. VI.

³⁸⁸ *United States-Bangladesh Bilateral Investment Treaty* 1986 signed 12 March 1986, entered into force 25 July 1989, Treaty Doc. 99-23 (US Congress); *European Union-Bangladesh Cooperation Agreement on Partnership and Development* 1999, signed 22 May 2000 (LEX-FAOC036142, 27 April 2001).

³⁸⁹ Correa, Carlos, 'Bilateralism in Intellectual Property: Defeating the WTO System for Access to Medicines', vol. 36, no. 79, *Case Western Reserve Journal of International Law*, 2004, p. 82.

³⁹⁰ Lea, David, 'The Expansion and Restructuring of Intellectual Property and Its Implications for the Developing World', vol. 11, no. 1, *Ethical Theory and Moral Practice*, 2008, p. 37.

Carolyn Deere, however, perceives a success of the Doha Declaration's 'waiver decision'³⁹¹ in the fact that the Bangladeshi Draft Patent Act 2007 does not incorporate the 'mailbox' provision that the Patents and Designs Act 2003 had incorporated.³⁹² (One of the effects of the waiver decision is that it exempts least-developed countries from the mailbox requirement, and thereby disallows the exclusive marketing rights of patent holders.) This brings in question the legality of the DPDT Order (referred to above) concerning the mail box provision. Nevertheless, as M. Rafiqul Islam points out,³⁹³ even though the s.84(10) provision of the Draft Patent Act concerning compulsory licences is worded thus to cover both the importing and exporting country:

... manufacture and export of patented pharmaceutical products to any country having insufficient or no manufacturing capacity in the pharmaceutical sector for the concerned product to address public health problems, provided compulsory license has been granted by such country,

argument is likely to arise about remuneration attendant upon the granting of the licence, and about whether export to non-WTO countries or countries without the requisite TRIPs compliance is permitted.

It is often claimed that Bangladesh has not done enough to exploit its right as an LDC to defer, pursuant to paragraph 6 of the Doha Declaration,³⁹⁴ the patent protection of pharmaceuticals until 2016, nor the attendant right under the waiver decision to reverse-

³⁹¹ The 'waiver decision' of 2003 was the decision to implement Paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health. The waiver decision allowed least-developed countries with a manufacturing capacity to reverse-engineer patented products, and to sell them in their domestic market, and to export those products to other least-developed countries under the compulsory licensing scheme.

³⁹² Deere, Carolyn, 2009, *Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Regime in Developing Countries*, Oxford University Press, p. 69.

³⁹³ Islam, M Rafiqul, 'How Bangladesh Can Cope with TRIPS: The Case of Pharmaceutical Products', Bangladesh Economic Association Conference, 2006.

³⁹⁴ Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, General Council Decision of 30 August 2003, WT/L/540, 2 September 2003.

engineer patented pharmaceutical products and make them available for sale on the domestic market and for export to other LDCs under the compulsory licensing scheme. Ferdaus, former executive director of the Saarc Chamber of Commerce & Industry, among others, advises that to avail itself of the potential benefits of this paragraph, this country has to amend the Patents and Designs Act 1911 and the Patent and Designs Rules 1933, or enact more competent new legislation.³⁹⁵

However, given the problems (discussed below) of implementing the compulsory licence law, and given the expense of the R&D necessary for developing a reverse-engineering technology, it is difficult to see that legislative reform can have an end other than the legally mandatory TRIPs compliance. Yet it is also true that UK Trade & Investment is ‘talking up’ the strength of the Bangladeshi pharmaceutical industry. It notes that ‘[a]round 80% of Bangladesh's total need of API is being met through imports’, but hastens to add that:

To meet the API demand locally the Bangladesh government's highest planning body, the executive committee of the national economic council (ECNEC), approved the Active Pharmaceutical Ingredient (API) park at Munshiganj at an overall project cost of \$31 billion in May 2008. It will be the country's first hub for medicine raw materials ... The project is expected to be completed by 2011.³⁹⁶

The reality is that the API park at Munshiganj is not yet in existence. According to UK Trade & Investment, ‘local companies have lined up some \$285 million for investment in the API Park’, but at this point, foreign companies are merely being invited to invest. The hope often expressed locally is that Bangladesh can compete with countries like India,

³⁹⁵ Ferdaus, Ara Begum, ‘Policy issues concerning intellectual property rights’, 31 May 2008, *Financial Express*.

³⁹⁶ UK Trade & Investment, Sector briefing: Pharmaceutical Opportunities in Bangladesh, www.ukti.gov.uk/.../Pharmaceutica%20Sector%20in%20Bangladesh.html, accessed 7 August 2010.

China, Brazil and Turkey on the global pharmaceuticals market. Obviously, whether it will be able to depends heavily on its ability to produce its own API. That in turn depends on the successful erection and operation of its API Park. But ironically, if it does become competitive in this context, it will have risen above LCD status, and with that, it will lose its LDCs-regarding, Doha Declaration-born licence to produce generic medicines.

The unavoidable, if cynical, view is that TRIPs compliance is merely of cosmetic importance in a state such as the UAE, because it is an excellent market for patent medicines. It is on the same level of unimportance in Bangladesh, but this time because that least-developed country's pharmaceutical industry is already substantively restrained by the TRIPs-compliance of the suppliers of its active pharmaceutical ingredients (AIPs). Besides, its market is not worth capturing by holders of pharmaceutical patents while the local-market favouring *Drug (Control) Ordinance* 1982 remains the current (not-TRIPs-compliant) law. This is likely to change after 2016, with Bangladesh's TRIPs compliance.

According to a report of the Netherlands Embassy in Dakar, most pharmaceutical multinationals have either abandoned or sold their interests in Bangladesh.³⁹⁷ Also according to this Netherlands report, the pharmaceutical sector is a major growth industry in Bangladesh. The country is nearly self-sufficient in pharmaceuticals, and is exporting

³⁹⁷ Netherlands Embassy in Dhaka, Report of 29 May 2008, 'Pharmaceutical Industry in Bangladesh: Market Overview', http://www.netherlandsembassydhaka.org/eco_pharma.html.

to 72 countries in Asia, Africa and Europe.³⁹⁸ But then, all that will necessarily change when TRIPS compliance is forced upon it in 2016.

There are optimistic views that Bangladesh can legislate in a manner that will protect public health once its transition period ends in 2016. Shamnad Basheer³⁹⁹ gives a very interesting account of how India made optimal use of TRIPS flexibilities to enable the protection of public health. One can extrapolate from this certain imperatives for Bangladesh: It must amend the *Patents and Designs Act* 1911 (the Act) and the *Patent and Designs Rules* 1933 (the Rules) such that (i) the Act contain a compulsory-licensing provision to the effect that Bangladesh is entitled to export pharmaceuticals under compulsory licence to TRIPS-compliant countries and to non-WTO-member countries without the capacity to manufacture them; (ii) the Act authorise the parallel importation of pharmaceuticals when it is in the interest of public health to do so, provided that the exporter is a licensed producer and seller of them; (iii) both the Act and the Rules be amended to provide against unfair commercial use of data submitted for the purpose of registering a new pharmaceutical product, and to provide, as India and Thailand had done, that the use of such data in an application for approval for the reproduction of generic medicines is not an unfair use. These provisions are unlikely to be challenged *per se*, for reason alone that they purport to support the human right to health, which is a principle of international law. But they are far from being provisions capable of regulating the extent to which applications for reproduction can be successful once

³⁹⁸ 'Square Pharma sets up insulin manfeg unit', *Bangladesh Economic New*, 28 April 2010, <http://bangladesheconomy.wordpress.com/category/pharmaceutical-industryhealthcare/>.

³⁹⁹ Basheer, Shamnad, 'India's Tryst with TRIPS: the Patents Amendment Act 2005', vol. 1, *Indian Journal of Law and Technology*, 2005, pp. 30 et seq.

TRIPS compliance becomes effective in 2016, and patents can be imposed on all generic pharmaceuticals.

Bangladesh's access to APIs, which the country needs for the continued functioning of its domestic industry, is already restricted by the now-full TRIPS compliance of India and China, upon which countries Bangladesh had relied for its API imports. It expects to set up its own API productions unit by 2011, with United Nations Industrial Development Organization (UNIDO) aid and partnership with global firms. In other words, the TRIPS effect is already visible. The Bangladeshi pharmaceutical industry was built on the manufacture of branded generic final formulations using approximately 80 percent of imported APIs, most of which are generic.⁴⁰⁰ Now, as the World Bank says, 'if Bangladesh wants to produce APIs, its workforce will need to acquire these skills'.⁴⁰¹ The erstwhile availability of generic APIs is the stool that was kicked out from under the Bangladeshi pharmaceutical industry in 2005, with India's and China's TRIPS compliance.

4.7 Patent medicines and the human right to health

It is now beyond question that international law exists to the clear effect that the right to health is a human right: According to the United Nations Committee on Economic, Social and Cultural Rights of 2000 (CESCR), the right to health includes a right to adequate and affordable health care, and imposes minimum core duties on governments. Lisa Foreman

⁴⁰⁰ World Bank, 'Public and Private Sector Approaches to Improving Pharmaceutical Quality in Bangladesh', Bangladesh Development Series Paper No. 23, March 2008, pp. 5, 15.

⁴⁰¹ Ibid. p. 23.

points out that ‘two-thirds of all countries ((153 of 192) have ratified the CESC. ⁴⁰²

Nevertheless, this Convention does not constitute binding law. That it has no more than a normative influence is evident in the fact that:

... despite AIDS being the worst infectious pandemic in modern history, the majority of infected people lack access to lifesaving, antiretroviral therapies. In sub-Saharan Africa, where over two-thirds of all people with HIV are located, only 28 percent have access to antiretroviral treatments. ⁴⁰³

On Foreman’s view, what is lacking is an ‘established legal relationship between human rights and TRIPs obligations at both a practical and theoretical level’. ⁴⁰⁴ This thesis writer is inclined to agree with Foreman, despite the well-worked case of Holger Hestermeyer, who argues that this legal relationship is in fact established by the TRIPs provisions themselves. ⁴⁰⁵ Hestermeyer rightly points out that pharmaceutical patent rights are modified by specific provisions that take note of the human right to health of poor nations. The following are those statutory modifications:

- (i) Article Art. 27(1) provides that WTO Members must grant patents ‘for any inventions ... in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application’.
- (ii) Article 29 provides that if the invention is patentable, the inventor obtains a patent with a term of at least twenty years from the date of filing.
- (iii) Article 33 provides that a patent on a product enables the patent-holder to prevent third parties from ‘making, using, offering for sale, selling or importing’ the product without that patent holder’s consent.

⁴⁰² Foreman, Lisa, ‘Trade Rules, Intellectual Property, and the Right to Health’, vol. 21, no. 3, *Ethics & International Affairs*, 2007, p.345.

⁴⁰³ Ibid. p.337.

⁴⁰⁴ Ibid. p.346.

⁴⁰⁵ Hestermeyer, Holger P. *Human Rights and the WTO: the Case of Patents and Access to Medicines*, 2007, Oxford University Press.

However, as the 2001 Doha Declaration⁴⁰⁶ pointed out, these provisions allow for certain substantial ‘flexibilities’ that give access to patent medicines to poor countries. The ‘flexibilities’ are the following:

Article 31 enables the granting by Members of compulsory licences, so long as those members are able to put a convincing case for their need for such a licence, they pay within a reasonable time a remuneration for it that the patent holder considers reasonable. In the event of a national emergency, the ‘reasonable time’ requirement may be waived. Article 31(f) provides that patent medicines manufactured under compulsory licence are done so only for the supply of the local market that has obtained the licence. That is, ‘compulsory licence’ products are not exportable.

The export ban, of course, put at great disadvantage on countries without adequate manufacturing facilities. The Doha Declaration claimed to be aware of this situation, and to have moved to correct it with its Paragraph 6.⁴⁰⁷ That, Hestermeyer claims, constituted a waiver under Article IX of the WTO Agreement that effectively amounted to a revision of the TRIPs.⁴⁰⁸ That waiver, basically, lifted the Article 31 export ban on medicines produced under compulsory licence. But the waiver is subject to strenuous conditions: the intending importer must (i) notify the Council for TRIPs of the name and expected quantity of the medication; (ii) prove that it is without the means of manufacturing the medication it intends to import; (iii) confirm that it has or will grant a compulsory licence if that medication is to be patented in its territory. With that process complete, the

⁴⁰⁶ Declaration on the TRIPs Agreement and Public Health, Doc. WT/MIN(01)/DEC/2, 20 November 2001.

⁴⁰⁷ Doha Declaration on the TRIPs Agreement and Public Health, Doc. WT/L/540, 2 September 2003.

⁴⁰⁸ Hestermeyer, note 405, p. 109.

exporting Member can issue a compulsory licence limited to the declared needs of the importing Member, and require that importing Member to colour-code (and otherwise identifying) the imported medications to prevent their re-export. Members can form pools as importers. This mechanism is subject to the annual review of the Council for TRIPs. For it to work, exporting members must amend their local patent laws to accommodate it. Doc. WT/L/641 (8 December 2005) amended the TRIPs with Article 31 *bis*⁴⁰⁹ to make this mechanism permanent.

Hetermeyer acknowledges that when Médecins Sans Frontières tested this new TRIPs provision in an effort to import the HIV drug TriAvir from the Canadian company Apotex, the mechanism proved too cumbersome, and in fact considerably more expensive than its importation from India would have been. He nevertheless sees this as a procedural problem, and not as a problem intrinsic in the TRIPs.⁴¹⁰ Médecins Sans Frontières, however, point out that ‘not a tablet of medicine has reached a single patient to any LDC under this WTO mechanism’.⁴¹¹

Even if one were to grant optimistically that the Médecins Sans Frontières’s Rwanda experience is attributable to something as eminently correctable as procedure, it would remain true that neither Article 31 *bis* nor the Doha Declaration took note of the ‘TRIPs-plus’ circumstances that work to restrict compulsory licensing rather than enable it. The

⁴⁰⁹ WTO General Council, ‘Amendment of the TRIPs Agreement’, http://www.wto.org/english/tratop_e/trips_e/wtl641_e.htm.

⁴¹⁰ Hetermeyer, note 405, p. 189.

⁴¹¹ Médecins Sans Frontières, ‘Neither expeditious, nor a solution: The WTO August 30th decision is unworkable’ Canada, MSF, 2006, http://www.msf.ch/fileadmin/user_upload/uploads/communiqués/images_2006/pdf/come_Neither_expeditious_nor_a_solution_-_August_30_and_the_JCPA_single_page.pdf.

progenitors of TRIPs-plus conditions regarding patent medicines are the regional trade agreements, like the Free Trade Area of the Americas (FTAA) and the US-Central American Free Trade Agreement (CAFTA), that often make a point of committing partner states to foregoing the compulsory-licensing waivers of the TRIPs.⁴¹² Clearly, there is no possibility that the human right to health will attain the status of binding international law while bi-lateral trade agreements remain free to cripple even the gestures in the direction of recognizing such a law that the Doha Declaration and Article 31 *bis* of the TRIPs have made.

4.8 Conclusion

This Chapter attempted to make out an argument to the effect that the TRIPs should implement as binding law specific demands upon the form and content of domestic legislatures to be capable of response to requests from least-developed and developing countries acting on the compulsory licensing facility. If the TRIPs can make such demands for the protection of GIs, then nothing prevents it from doing so to make its compulsory licensing facility workable. This argument was derived from a context that (i) estimated the Paris Convention provisions regarding compulsory licensing above the TRIPs provisions; (ii) gainsaid Chien's view that compulsory licensing somehow harms the pharmaceutical industry; (iii) outlines the TRIPs GI regime to serve as a comparison with its compulsory licensing regimes; (iv) celebrated India's clever handling of the interim between the Paris Convention and the TRIPs that earned her a sound pharmaceutical industry; and (v) noted the exposure by Médecins Sans Frontières that

⁴¹² Médecins Sans Frontières 'Top ten list of the year's most underreported humanitarian stories', Media release, 6 January 2004.

the compulsory licensing facility was unworkable by the least-developed countries, and, according to another source, is inert in China for fear of trade reprisals; and (vi) condemned the bullying tactics of the US 'Special 301'.

The argument itself relied upon a distinction (of considerable pedigree) between 'the rule of law' and 'rule by law', making use of Intan Ramli's method. The crux of the argument was there while WTO member states are free to implement domestic legislation (or not implement it) with regard to their response-styles to requests for production and importation of medicines under the compulsory licensing facility, that facility is not grounded in law. Law and only law confers rights, and only law enables the redress of the denial of rights. The TRIPs compulsory licensing facility is therefore not law. Notably, the TRIPs regime regarding GIs in the wine and spirits industry is law. It was urged that if TRIPs can construct real law to protect wines and spirits, it can construct real law to protect the right to essential medicines of the people's of least-developed countries.

A final look at the TRIPs from the point of view of the human right to health concluded that this agreement, the Doha Declaration notwithstanding, remains far away from acknowledging this human right.

In the next Chapter, the allegations levelled against the TRIMs by WTO member states will be discussed, including the predicament posed by trade from multi-national companies resorting to transfer pricing, restrictive business methods, and other unfair practices. It will also discuss why TRIMs requires all WTO members to eliminate

domestic content requirements and why import/export balancing requirements are placed upon foreign affiliates.

The goal will be to demonstrate how the scope of the TRIMs is very narrow, and how the WTO is yet to make its ruling on the admission of foreign investment, or on such concerns as financial incentives, tax reductions and the grading of land and various services in a privileged manner, nor does it dwell at all significantly on exclusions or the easing of restrictions existing at the national level.

Chapter 5

Developing Countries and the TRIMs

5.0 Introduction

The Trade-Related Investment Measures (TRIMs) Agreement, which came into effect on 1 January 1995, formed part of the Uruguay Round negotiations of the World Trade Organisation (WTO). This Agreement is intended to accommodate and facilitate the global increase in cross-border trade-related investment transactions.⁴¹³ It sets about confirming the anti-discrimination policies and domestic-treatment principles contained in the General Agreement on Trade and Tariffs (GATT).⁴¹⁴ The primary goal of the TRIMs is to harmonise and liberalise national trade rules that pertain to investment.⁴¹⁵ However, the economic and social gaps between developed and developing nations are problematic for the TRIMs, truncating and tending to frustrate this Agreement's desired impact. The discussion that follows examines the legal framework and ultimate goals of the TRIMs, comments on how they achieve their goals, and on where they fall short of them. There is particular emphasis on the impact of the TRIMs and the consequences of that impact for developing nations.

5.1 Legal framework of the TRIMs Agreement

The GATT of 1947 made provisions for the prohibition of WTO Member States' local regulations that contradict the 'national treatment' policy, and for the abolition of

⁴¹³ Damro, Chad, 'Multilateral Competition Policy and Transatlantic Compromise', vol. 9, no. 2, *European Foreign Affairs Review*, 2004, pp. 269-287.

⁴¹⁴ Steinbery, Richard, 'In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO', vol. 56, no. 2, *International Organization*, 2002, pp. 339-374.

⁴¹⁵ Ibid.

quantitative restriction.⁴¹⁶ However, these prohibitive provisions were not clearly laid out. The TRIMs corrected this lack of clarity by requiring that local legislation be consistent with either Articles III or XI of the 1994 GATT.⁴¹⁷ Additionally, the TRIMs list specifically prohibits national-content regulations, proffers trade-levelling criteria, and rules out foreign-exchange and export-restriction practices that are inconsistent with Articles III or XI of the GATT.⁴¹⁸ (See Appendix A for an illustrative list practices that, pursuant to the TRIMs, are inconsistent with Articles III or XI of GATT.)

Article III of the GATT makes provision against discriminatory practices in respect of the importation of goods and products between WTO Member States. Article III(1) prohibits the levying of taxation and other fees on imports when those fees serve the sole purpose of affording ‘protection to domestic production’.⁴¹⁹ Article III(2) prohibits the imposition of import taxes on products that exceed the taxation liability of similar domestic products.⁴²⁰ Article III (3) makes provision for extension-of-time applications for the removal from domestic regulations of requirements inconsistent with Article III(2) regarding multi-national trade agreements.⁴²¹

Article III(4) of the GATT specifically calls for non-discriminatory treatment among trading WTO member states:

⁴¹⁶ Ibid.

⁴¹⁷ Agreement on Trade Related Investment Measures, Article 2(1)

⁴¹⁸ Hoekman, Bernard, 1995, *Trade Laws and Institutions: Good Practices and the World Trade Organization*, p. 40, World Bank Publications, p. 40.

⁴¹⁹ GATT 1947, Article III(1).

⁴²⁰ Ibid. Article III(2).

⁴²¹ Ibid. Article III(3).

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.⁴²²

Article III(5) prohibits the quantitative restrictions of imports from one WTO Member State to another.⁴²³ Article III (6) exempts from Article III (5) quantitative restrictions or regulations that were in place on ‘July 1, 1939, April 10, 1947 or March 24, 1948’,⁴²⁴ but only where circumstances justify those restrictions or regulations:

...any such regulation which is contrary to the provisions of paragraph 5 shall not be modified to the detriment of imports and shall be treated as a customs duty for the purpose of negotiation.⁴²⁵

Article III(7) prohibits the application to cross-border imports of domestic quantitative restrictions on mixtures, proportions and uses of products.⁴²⁶ Article III (8) (a) exempts governmental concerns from this quantitative restriction.⁴²⁷

Article XI prohibits certain subsidies:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.⁴²⁸

⁴²² GATT (1947), Article III(4).

⁴²³ Ibid. Article III(5).

⁴²⁴ Ibid, Article III(6).

⁴²⁵ Ibid.

⁴²⁶ Ibid. Article III(7).

⁴²⁷ Ibid. Article III(8)(a).

⁴²⁸ Ibid. Article XI(1).

The remaining paragraphs of Article XI make provision for exemptions and extensions regarding inconsistencies in terms similar to the exemption and exceptions provided for in Article III.

In general, the TRIMs require that the WTO eliminate, within a certain period, regulations that are inconsistent with Articles III and XI of GATT. In other words, WTO member states are required to eliminate domestic provisions that allow investment approval to be a contingency of regulations and policies that favour local products and materials. The TRIMs came into effect on 1 January 1995, with three different time-frames for the elimination of investment measures that are inconsistent with Articles III and XI of the GATT. While Paragraph 1 of Article 5 of TRIMs require that WTO Member States notify the WTO, within 90 days of the TRIMs Agreement's effective date, of any measures that do not conform to Articles III and XI of GATT. Paragraph 2 of Article 5 provides:

Each Member shall eliminate all TRIMs which are notified under paragraph 1 within two years of the date of entry into force of the WTO Agreement in the case of a developed country Member, within five years in the case of a developing country Member, and within seven years in the case of a least-developed country Member.⁴²⁹

Therefore, by January 2000, all developing nations should have eliminated all their regulations that are inconsistent with GATT Articles III and XI. However, Article 5(3) of the TRIMs allows both developing and least-developed nations to apply for extensions of the transition period.⁴³⁰

⁴²⁹ Agreement on Trade Related Investment Measures, Article 5(2).

⁴³⁰ Ibid. Article 5(3).

Bernard Hoekman maintains that the TRIMs were among the Uruguay Round's most 'controversial topics'.⁴³¹ The Agreement came into being as a compromise between the opposing positions of developing and developed nations. Hoekman explains:

Many developing countries were of the view that attempting to agree to broad-ranging multilateral disciplines on policies affecting investment went far beyond the scope of the GATT, and that the GATT was not necessarily the appropriate forum for such an agreement (or attempt). Certain OECD countries and the United States in particular, were of the view that policies distorting investment flows could have a significant impact on trade flows, and should be subject to multilateral disciplines.⁴³²

The resulting TRIMs compromise seeks to tie in with the GATT disciplines that place bans on quantitative restrictions, and confirms the WTO's position on national treatment.⁴³³

When an application is made for an extension of transition time, it is considered by the WTO's Council for Trade in Goods (CTG). In a typical case, the requesting Member State submits an application to the CTG, then submits itself, through its representatives, to extensive questioning by representatives of other Member States. The most aggressive interrogators so far have been the representatives of the European Community (EC), Japan and the United States.⁴³⁴

In November 2000, Carlos Perez del Castillo, Chairman Ambassador to the WTO's CTG, announced that nine countries had applied for transitions extensions of their TRIMs

⁴³¹ Hoekman, note 418, p. 41.

⁴³² Ibid.

⁴³³ Ibid.

⁴³⁴ Mashayekhi, Mina, and Gibbs, Murray, 'Lessons from the Uruguay Round Negotiations on Investment', vol. 33, no. 6, *Journal of World Trade*, 1999, p. 13.

compliance, and that he proposed allowing all of them two-year extensions. The applicants were from the Philippines, Mexico, Argentina, Chile, Columbia, Pakistan, Romania and Thailand. Their applications concerned ‘mostly ... domestic investment schemes in their auto industries’.⁴³⁵ Castillo announced also his proposal that any of these countries that might seek transition extension beyond the two-year extension granted them should be on notice that a second two-year extension would not be granted them automatically, but would be considered on a ‘case by case basis’, and would certainly be, if granted, their last extension.⁴³⁶

Ambassador Rita Hayes, representing the United States, took the position in support of the CTG’s proposal regarding Argentina, Chile, Romania and Mexico, inasmuch as it concerned their auto industries, but expressed preparedness to support Thailand’s application regarding its dairy products. Hayes noted also that the United States would not automatically agree to a second extension, and would in future insist that requesting nations provide ‘a clear phase-out plan’.⁴³⁷ The EC was less accommodating, noting that it is still waiting for responses to queries put to the applicant nations.⁴³⁸ In the meantime, the US filed a complaint with the DSB over the Philippines’ ‘automotive sector’.⁴³⁹ The EC filed a complaint about a similar dispute with India, concerning the latter’s ‘automotive industry products’.⁴⁴⁰

⁴³⁵ ICSID, ‘Goods Council Makes Good on Extension of TRIMS Deadline’, vol. 4, no. 44, *ICTSD Bridges Weekly Trade News Digest*, 21 November, 2000. <http://www.ictsd.org/html/weekly/story4.21-11-00.htm>.

⁴³⁶ Ibid.

⁴³⁷ Ibid.

⁴³⁸ Ibid.

⁴³⁹ Ibid.

⁴⁴⁰ Ibid.

Japan, on the other hand, had no difficulty with the nine requesting Member States, and fully agreed with Castillo's proposal for extension.⁴⁴¹ On 31 July, the WTO, via its CTG, agreed to a three-year extension of the requesting countries' TRIMs transition period. As a result, the requesting countries had until 31 December 2003, and no later, to eliminate all their TRIMs-related local regulations that were inconsistent with GATT Articles III and XI.⁴⁴²

Sarah Dillon explains the significance of the WTO's TRIMs and the resulting disparity between socio-economic concepts of developing and developed WTO nations. The TRIMs requirements, she opines, are calculated to 'influence the commercial decisions of foreign investors in favour of a certain socio-economic policies of the host country'.⁴⁴³ Dillon adds that the TRIMs have the capacity to 'encompass a wide range of national measures, including local content requirements, to increase local procurement by investors, or export volume'.⁴⁴⁴

5.2 Cases arbitrating TRIMs disputes

The World Trade Organization by virtue of the Uruguay Round established a relatively efficient method of settling trade disputes. The WTO was set up in 1995 and replaces the GATT. As the BBC opined in January 2007:

⁴⁴¹ Ibid.

⁴⁴² ICSID, note 435.

⁴⁴³ Dillon, Sarah, 2002, *International Trade and Economic Law and the European Union*, Hart Publishing, p. 96.

⁴⁴⁴ Ibid.

The WTO is the only international agency overseeing the rules of international trade. It polices free trade agreements, settles trade disputes between governments and organises trade negotiations.⁴⁴⁵

The general aim of the WTO is not to pass judgment but to encourage dispute settlement between nations via a series of steps commencing with consultation and negotiation between Member States. The WTO is headquartered in Geneva, and its highest body is the Ministerial Conference, which meets once every two years. Its most significant functions are to elect the Director-General and to supervise the work and conduct of the General Council.⁴⁴⁶ The Ministerial Conference also conducts what is referred to as ‘trade rounds’, which are negotiations calculated to remove and/or minimise international trade barriers.⁴⁴⁷

By subscribing as Member States to the WTO, Members agree that in the event of a trade dispute or upon the knowledge that another Member State is violating WTO trade rules, they will ‘use the multilateral system of settling disputes instead of taking action unilaterally’.⁴⁴⁸ In a typical scenario, a dispute will arise when a Member State carries on trade with policy measure that other WTO Member States believe are contrary to the regulations and spirit of the WTO Agreements. Member States not directly impacted by the alleged infraction can nonetheless subscribe to the complaint process as third parties.⁴⁴⁹

⁴⁴⁵ BBC News, ‘Profile: The World Trade Organization’, January 2007.
http://news.bbc.co.uk/1/hi/world/europe/country_profiles/2429503.stm.

⁴⁴⁶ Ibid.

⁴⁴⁷ Ibid.

⁴⁴⁸ World Trade Organization, ‘Understanding the WTO: Settling Disputes’,
http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm.

⁴⁴⁹ Ibid.

Ideally, under the WTO legal framework and regime, the complaining Member State will request consultation with the offending Member State. If the consultation does not produce satisfactory results, the complaining State is at liberty to request assistance from the WTO by way of the formation of a panel. Even after a panel is formed, and a tribunal-like procedure takes shape, the parties are free to continue with mediation and consultation.⁴⁵⁰ The Panel will hear both sides and third parties, and thereafter, publish a report of its findings and recommendations. The party against whom the panel finds is at liberty to appeal on points of law only.

The first significant TRIMs dispute was brought against Indonesia by the United States, the EC and Japan.⁴⁵¹ In that case, the complainants charged that the Indonesian automobile program was in contravention of the TRIMs Agreement, particularly of Article 2, which provides:

1. Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994.
2. An illustrative list of TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 and the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 is contained in the Annex to this Agreement.⁴⁵²

The measure giving rise to this claim was an economic measure taken by Indonesia to correct a local situation, wherein there was an excess of domestic automobile parts, by imposing import taxes and duties on foreign automotives and incidental parts. KIA cars,

⁴⁵⁰ Ibid.

⁴⁵¹ *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12, 1998.

⁴⁵² Agreement on Trade Related Investment Measures, Article 2.

however, imported from Korea and containing Indonesian parts, were altogether fee exempt.⁴⁵³

Indonesia claimed that the measure was justified in the light of its desire to encourage increased production of domestic automobiles and incidental parts. In addition to maintaining that Indonesia's domestic incentive violated Article 2 of the TRIMs Agreement, the complainants submitted further that it violated also Article 5 of the Agreement, in that Indonesia had failed to notify the WTO that it was applying measures that were inconsistent with the TRIMs, and that it was not in compliance with the provision for transition.⁴⁵⁴

In 1996, a series of negotiations took place between each of the complaining nations and Indonesia. These talks did not yield satisfactory results, and the complaining nations filed an official dispute claim with the WTO. The WTO panel hearing the dispute concluded that, in order for a domestic TRIMs-related regulations to contravene Article 2 of the TRIMs Agreement, it has to confer a benefit or an advantage on another Member State. In this instance, an advantage was clearly conferred upon Korea, via the tax-exempt KIA cars.⁴⁵⁵ Moreover, the Panel found that Indonesia had failed to invoke the general exceptions provided for under GATT and adopted by Article 3 of the TRIMs. These exemptions arise when measures are implemented to guard against danger to health,

⁴⁵³ Ibid.

⁴⁵⁴ Ibid.

⁴⁵⁵ Ibid.

morals and national security. The Indonesian measure that caused the complaint was not implemented for the purpose of averting any such danger.⁴⁵⁶

The Panel found further that Indonesia failed also to invoke the exemptions provided for in Article 4 of TRIMs, which are:

A developing country Member shall be free to deviate temporarily from the provisions of Article 2 to the extent and in such a manner as Article XVIII of GATT 1994, the Understanding on the Balance-of-Payments Provisions of GATT 1994, and the Declaration on Trade Measures Taken for Balance-of-Payments Purposes adopted on 28 November 1979 (BISD 26S/205-209) permit the Member to deviate from the provisions of Articles III and XI of GATT 1994.

Additionally, the Panel ruled that Indonesia, by failing to notify the WTO of its TRIMs-regarding domestic measure, had not taken advantage of Article 5 of TRIMs, which permitted the continuation of domestic TRIMs during the transition period.⁴⁵⁷ As a result of these findings, the Panel requested that Indonesia ‘bring its measures into conformity with its obligations under the WTO Agreement’.⁴⁵⁸

Indonesia maintained that it needs at least 15 months to adhere to the conformity request, but the opposing parties insisted that six months was all that was necessary. It was ruled however, that taking into consideration Indonesia’s status as a developing nation, together with the fact that it suffered from dire financial difficulties, 12 months was a reasonable time for the country to implement conforming measures’.⁴⁵⁹

⁴⁵⁶ Ibid.

⁴⁵⁷ Ibid.

⁴⁵⁸ Ibid.

⁴⁵⁹ Ibid.

In a more recent case filed with the WTO by the EC against Turkey, the parties reached a temporary settlement.⁴⁶⁰ The complaint was lodged by the EC on behalf of the European Federation of Pharmaceutical Industries and Associations (EFPIA). The complainant submitted that certain legislative and policy practices in Turkey were impacting negatively on EC pharmaceutical goods throughout the Turkish market. The basis of the complaint was that Turkey's pricing rules of 2004 contravened Article III of GATT, as well as Article 2 of the TRIMs Agreement, because those rules afforded 'preferential pricing treatment ... to pharmaceutical products incorporating materials of national origin.'⁴⁶¹

By January 2005, the Turkish authorities had agreed to make satisfactory modifications by removing the discriminatory pricing practices that had been supporting local pharmaceuticals and imported pharmaceuticals.⁴⁶²

In *Canada–Certain Measures Affecting the Automotive Industry*,⁴⁶³ the EC's complaint was based on an argument submitted by Japan. On 3 July 1998, the Japanese took issue with a Canadian legislative provision that endorsed an automotive-parts-and-products agreement, the 'Auto Pact'.⁴⁶⁴ The Auto Pact was an arrangement between Canada and the United States on which only a certain number of vehicles would be imported into Canada duty exempt, for distribution within Canada on a wholesale and retail basis.

⁴⁶⁰ *EC v. Turkey*, General Overview of Active WTO Dispute Settlement Cases Involving the EC as Complainant or Defendant and of Active Cases under the Trade Barriers Regulations, 20 July 2007, pp. 37-38, http://trade.ec.europa.eu/doclib/docs/2007/may/tradoc_134652.pdf.

⁴⁶¹ Ibid.

⁴⁶² Ibid.

⁴⁶³ Panel Report, WT/DS139/R, WT/DS142/R, 2000.

⁴⁶⁴ Ibid.

Japan argued that the duty exemption was reliant on a requirement: (i) that Canadian value-added tax be applicable to both services and goods, and (ii) that that tax pertain to both sales and manufacturing.⁴⁶⁵ The Japanese complained that these requirements contravened several international obligations, and specifically, Articles I(1) and III(4) of the GATT, as well as Article 2 of the TRIMs.⁴⁶⁶

On 17 August 1998, the EC made a request for consultation with Canada, and cited the contraventions identified by Japan. On 12 November of the same year, Japan took matters a step further by requesting that a WTO panel convene, and then that the WTO's Dispute Settlement Board defer this request for the establishing of a Panel. Continued joint efforts by Japan and the EC led to the establishing of a single Panel to examine the complaints, and India, Korea and the United States joined as third parties. The Panel's report was published and circulated on 11 February 2000. The Panel concluded that the complaint was well founded. In the following month, Canada appealed that decision, taking issue with several of the Panel's findings.⁴⁶⁷ The Appellate Body reversed two of the DSB's findings, but the issues those findings had canvassed were not related to the TRIMs Agreement, and are therefore not relevant to this discussion.

On 19 June 2000, the DSB incorporated the Appellate Body's findings into its Report, and as a result of its recommendations, Canada agreed to amend its legislative provisions that had enabled discriminatory duty exemptions in the automotive industry, to render them TRIMs and GATT compliant. A reasonable time for the transition was fixed to be

⁴⁶⁵ *EC v. Turkey*, note 460.

⁴⁶⁶ *Ibid.*

⁴⁶⁷ *Ibid.*

no later than 19 February 2001. A meeting of the WTO DSB on 12 March 2001 found that Canada had complied with the Panel's recommendations.⁴⁶⁸

In *India—Measures Affecting the Automotive Sector*,⁴⁶⁹ the EC took issue with specific measures deployed by India (in its automotive sector) under the policies enunciated in the documents 'Export and Import Policy 1998-2002', 'Public Notice No. 60 (PN/97-02) of 12 December 1997' and 'Export and Import Policy April 1997-March 2002'. These policies were fortified by legislative provisions, and by a Memorandum of Understanding endorsed by the Indian Government and particular automobile manufacturers.⁴⁷⁰ The EC's complaint alleged that (i) the measures and policies implemented by the Indian officials were reliant on a 'non-automatic' system for processing import licences;⁴⁷¹ (ii) in view of the policy numbered 60 in the Indian Government's Memorandum of Understanding, it was highly unlikely that the import-licence applications of applicants engaged in joint enterprises with national manufacturers would succeed, because the Memorandum included an undertaking of adherence to specific national export and content-balancing criteria; and that (iii) these conditions exist in direct contravention of Articles III and XI of GATT as well as Article 2 of TRIMs.⁴⁷²

When the first request for a Panel was denied by the WTO, the EC made a second request, which was allowed on 17 November 2000. After considering the merits of the complaint, the Panel released its decision on 21 December 2001. It found that: (i) India

⁴⁶⁸ Ibid.

⁴⁶⁹ WT/DS146, 1998.

⁴⁷⁰ Ibid.

⁴⁷¹ Ibid.

⁴⁷² Ibid.

had violated Article III(4) of the GATT, and by extension the TRIMs, by its implementation of measures that placed automotive manufacturers under a duty to use certain local auto-parts for manufacturing motor vehicles; (ii) India contravened Article XI of the GATT by the imposition of the requirement that automotive manufacturers ‘balance off’ specific automotive kits, and incidentals of similar value, against exports. This trade-balancing practice (whereby traders are duty-bound to offset the import cost of goods previously protected on the Indian market) against export revenue from comparable goods is contrary to Article III(4) of the GATT.⁴⁷³ The Panel then recommended that India take steps to bring its legislative and policy practices into conformity with WTO Agreements, including Articles III (4) and XI of the GATT and Article 2 of the TRIMS Agreement.⁴⁷⁴

Although India appealed the Panel’s decision, it subsequently withdrew its appeal and entered into discussions and negotiations with the EC and the United States, a third party to the proceedings. The result was that India agreed to modify its legislative and policy practices regarding the automotive industry, and both parties agreed that a reasonable time for conformity was five months, meaning that India would make the necessary modifications by September 2002. By 6 November 2002, India had informed the DSB that it had fully modified its legislative and policy practices by deleting the trade balancing and ‘indigenisation’ requirements it had imposed on the automotive trade.

⁴⁷³ Ibid.

⁴⁷⁴ Ibid.

The case *US v. Philippines—Measures Affecting Trade and Investment in the Motor Vehicle Sector*⁴⁷⁵ arbitrated an interesting dispute between the United States against the Philippines. In May 2000, the US requested discussions and consultation with the Philippines about certain measures implemented by the Philippines Department of Motor Vehicles, which included programs known as the Car Development Program, the Commercial Development Program and the Motorcycle Development Program. The United States was of the opinion that these programs had implemented measures of dubious legality: (i) Philippine motor-vehicle manufacturers meeting certain standards and requirements were at liberty to import certain automotive parts and vehicles at favourable tariffs rates; (ii) import licences for foreign manufacturers trading automobile parts and finished vehicles were subject to the meeting of certain standards and requirements, such as the commitment to using Philippine automobile parts, and, where they imported those parts, to sharing the foreign exchange percentage generated by the exportation of finished vehicles.⁴⁷⁶

In general, the United States charged that these measures are inconsistent with Articles III (4) and XI(1) of GATT, and with Articles 2(1) and 2(2) of the TRIMs. The US, wholly unsatisfied with the progress of consultations with the Philippines, requested that the WTO form a Panel. A second request was necessary, but by 17 November 2000, the WTO had agreed to meet it. Yet the Panel was never composed.⁴⁷⁷

⁴⁷⁵ WT/DS195, 2000.

⁴⁷⁶ Ibid.

⁴⁷⁷ Dunoff, Jeffrey L, 'Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law', vol. 17, no. 3, *European Journal of International Law*, 2006, footnote 45, p. 658.

5.3 TRIMs consequences for developing countries

The most obvious difficulty for developing nations stems from the new, and so-called ‘improved’ dispute settlement procedures. Phillip Anthony O’Hara notes that previously, under the GATT, decisions were binding only if the disputing parties came to an agreement. But on this scheme, a single party could block a ruling by refusing to adopt it.⁴⁷⁸ The establishment of the WTO in 1995 reversed this standing rule by binding all parties to a panel’s decision, unless and until all agree to abandon it.⁴⁷⁹ O’Hara notes that:

It may seem that the WTO has made an improvement in the process of settling disputes and in moving closer to a ‘rule-based system’. However, the new procedures have in fact made the situation worse for poor and developing countries.⁴⁸⁰

There is no escaping the conclusion that a majority of the complaining countries are developed nations, while the respondents are largely the developing and least developed nations. In terms of financial resources and expertise, it is highly unlikely that the developing nation is in a position to persuade the developed nation to agree to abandon a ruling, unless, of course, the ruling is against the developed nation. It is therefore fair to state that the new dispute-settlement mechanism functions to favour developed nation and leaves developing nation at a disadvantage because of the inequality in bargaining positions.

Arguably, this inequality is not necessarily detrimental to developing and least developed nations. O’Hara acknowledges that there are those who maintain that inequality can lead

⁴⁷⁸ O’Hara, Phillip Anthony, 2004, *Global Political Economy and the Wealth of Nations: Performance, institutions, problems and policies*, Routledge, p. 175.

⁴⁷⁹ Ibid.

⁴⁸⁰ Ibid.

to ‘growth and progress’.⁴⁸¹ The wealthy, by sharing their products, encourage innovation and shared profits.⁴⁸² The general consensus among writers who support globalisation is that failure to participate in globalisation is by and large responsible for the inequality in wealth and power among the developing and developed nations. In other words, globalisation equality accrues to those nations that fully subscribe to it, ‘and penalises those that maintain restrictions on trade and capital flows’.⁴⁸³

Others argue that globalisation inequality only widens the gap between the ‘haves’ and the ‘have nots’, and widens the gap between the developed and developing nations. Paul Streeten, for instance, maintains that:

... liberalisation, the realignment of the economy ... technological change and the savage competition that accompanied globalisation have contributed to an increase in poverty, inequality, and labour insecurity ... the weakening of social support institutions and systems, together with the erosion of identities and established values.⁴⁸⁴

Whether one argument is validated to a greater degree than the other, the fact remains that disadvantage to developing nations is inherent in the negotiations-oriented culture of the WTO. John S. Odell identifies three significant reasons for this conclusion. To start with, in the typical case, the developing nation has a ‘far more transparent domestic political systems’ than does a developed nation.⁴⁸⁵ This puts the developing nation in a vulnerable position in the WTO-typical ‘two-level games’,⁴⁸⁶ where the ‘analytical focus’

⁴⁸¹ Ibid.

⁴⁸² Ibid.

⁴⁸³ Ibid

⁴⁸⁴ Streeten, Paul, ‘Beyond the Six Veils: Conceptualizing and Measuring Poverty’, vol. 52, *Journal of International Affairs*, September 1998, p. 125.

⁴⁸⁵ Odell, John S, 2006, *Negotiating Trade: Developing Countries in the WTO and NAFTA*, Cambridge University Press, p.147.

⁴⁸⁶ Ibid.

on what is perceived is less on what is put forward as substantive argument than on what are the ‘domestic political constraints’.⁴⁸⁷

Secondly, a developed nation is in a better position to sponsor the accumulation and processing of information for the duration of negotiation proceedings. This is so because developed nations will usually have at their disposal the requisite expertise. Developing nations usually do not have these kinds of resources, and as a result, tend to ‘pay less attention to information problems’.⁴⁸⁸ Odell warns:

From a positivist perspective, this implies that it is misleading to try to use beliefs to explain developing countries’ negotiation behaviour. From a normative, prescriptive (policy-science) perspective, this could mean that there is urgent need for developing countries to acquire expertise in information processing and updating.⁴⁸⁹

The third and final maker of the inequality in the bargaining power of developing and developed nations that Odell identifies is the relatively aggressive nature of the representatives from developed nations. According to Odell, research results indicate that developed nations are usually represented by actors who are stronger in terms of negotiating ‘offers, content and timing of agreement’.⁴⁹⁰

Unexpectedly, Bangladesh was the first of the least-developed countries to request consultation about anti-dumping regulations. Its request for consultation was lodged on 28 January 2004, well after the GATT came into force, and almost a decade since its successor, the WTO, was formed. This timeline speaks clearly for the inequality of

⁴⁸⁷ Ibid.

⁴⁸⁸ Ibid.

⁴⁸⁹ Ibid. p. 149.

⁴⁹⁰ Ibid.

bargaining positions between the developed nations and the developing nations, and is also reflective of the lack of confidence and resources on the part of the developing and least developed nations. In that case, *India–Anti-Dumping Measure on Batteries from Bangladesh*,⁴⁹¹ Bangladesh requested consultation with India about India’s anti-dumping measures regarding imported acid batteries originating from Bangladesh. The latter’s concern was that the investigation carried out by the Indian authorities resulted in India’s erecting anti-dumping measures that were inherently flawed. Bangladesh’s concerns about the investigation can be summarised as follows:

1. The investigation was initiated despite the fact that the application for it was supported by a claim that Indian domestic industries were under threat, and that claim was unfounded, since in India imports from Bangladesh were minimal.
2. The determination of the financial margins ‘normal valuation’, a ‘perceived valuation’ and ‘export prices’, and the comparison between export price and normal value, were erroneous.
3. Ascertainment of causation and damages by examination of the volume of imports, impact on pricing, national production of similar goods, including Bangladesh imports for assessment of import effects, determination of pertinent facts and circumstances, and determination of the nexus between imports and the damages alleged were all flawed.
4. The investigation failed also to properly consider the evidence by omitting to take into consideration data and information introduced by Bangladesh. It was

⁴⁹¹ (Request for Consultation), WT/DS306, 28 January 2004.

disrespectful of the confidential information submitted by Bangladesh, and it neglected to share 'essential facts under consideration which form the basis for the decision to apply definitive measures'.⁴⁹²

Further, the Indian authorities were alleged to have failed to serve notice of 'all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures'.⁴⁹³

Bangladesh claimed that these allegations of infractions by of India represented violations of various provisions of GATT 1994, including Article III. Bangladesh claimed also that as a result of these violations, it was being denied its benefits and advantages under the GATT. On 20 February 2004, the European Community joined the consultation process, and on 20 February 2006, India was persuaded to withdraw its Customs' notification that had given rise to its anti-dumping provisions.⁴⁹⁴ There is no way of knowing whether Bangladesh would have been able to negotiate India's withdrawal without the assistance of the EC, but it is worth noting that this was yet another instance in which the will of the developed nation prevailed over that of the developing nation.

Another case demonstrative of the inequality of resources and facilities between developed and developing nations, and how this impacts the negotiation process

⁴⁹² Ibid.

⁴⁹³ Ibid.

⁴⁹⁴ Ibid.

envisioned by the WTO, is the case of *US–Textiles Rules of Origin*,⁴⁹⁵ India requested consultations with the United States about US legislation applicable to the importation of apparel and textile products and the customs policies. The US legislation giving rise to concern was Section 334 of the Uruguay Round Agreement Act and Section 405 of the Trade and Development Act 2000.

India maintained that the introduction of Section 334 of the Uruguay Round Agreement Act functioned to confer a biased method of identifying the origins of textile and apparel products. India was of the opinion that the identifying method was designed to safeguard the United States against competition in the area of textile and apparel production.

Interestingly, India stated that the United States had already been challenged by the EC on the same grounds, to wit: Section 334 was inconsistent with the Member State obligations under the Rules of Origin, and with WTO Agreements generally. The dispute between the United States and the EC was settled by the United States agreeing to amend Section 334 and implementing Section 405 of the Trade and Development Act 2000. This latter section, India claimed, was calculated to accommodate exports originating from the EC.⁴⁹⁶

According to India, these legislative changes had the effect of introducing different tests to determine the origin of like products, and the methods for processing those products. India argued that the circumstances in which the legislative provisions were introduced, and their overall impact on competition, strongly indicates that those legislative

⁴⁹⁵ *United States–Rules of Origin for Textiles and Apparel Products*, WT/DS 243, 11 January 2002.

⁴⁹⁶ *Ibid.*

provisions were motivated by specific and unjustifiable trade policies. Both legislative provisions were therefore in breach of Article 2 of the *Agreement on Rules of Origin* 1968. This was the argument with which India supported its request for a panel on 7 May 2002.⁴⁹⁷

On 24 June 2002, the DSB agreed to the establishing of a panel, and it convened on 10 October 2002. The panel published and circulated its report in June of the following year. It found generally that India had failed to prove its claims.⁴⁹⁸ This result is a manifestation of the inherent disparities between developing nations and developed nations. As argued by India, when the EC took a similar position against the United States, these two parties, both developed nations, reached a satisfactory agreement. However, when India, a developing nation, attempted to negotiate with the United States, it could not secure a satisfactory agreement. There is no doubt that India's claim had merit, since the EC's similar claim had succeeded against the US. The difference in the outcome of the two claims is accounted for by the manner in which they were negotiated. Obviously, India lacked the resources, information and expertise to advance its position effectively. This inequality of bargaining position disadvantages developing nations in the WTO's vision for international trade harmony and liberalisation.

Integration into the world trade climate is a far more complicated endeavour for developing countries than it is for developed nations. Developing nations struggle with internal economic policies that are geared toward stabilisation, with the modification of

⁴⁹⁷ Ibid.

⁴⁹⁸ Ibid.

their balance-of-payment deficits, and in general, with the reformation of their ‘trade and exchange rate regime’.⁴⁹⁹ Moreover, in developed nations the members of the public are by and large of one mind on the question of globalisation, and are in general already open to the practice of participating in a global economy. The same cannot be said for members of the public in developing nations. Stephen Haggard notes that:

In the developing world, by contrast, the domestic coalitions supportive of a more open stance toward the world economy have not usually been consolidated. Interventionist development strategies have naturally created strong interests in the policy status quo, and in many developing countries, deep intellectual divisions and political cleavages remain over the merits of closer integration with the world economy.⁵⁰⁰

Haggard goes on to explain that internal difficulties only add to the difficulty of integration and conformity with international trade rules and regulations. Political instability poses an administrative problem for the governments of developing nations in much the same manner as economic instability does.⁵⁰¹ Upon joining the WTO, these countries were already struggling with policies and measures calculated to address internal socio-economic difficulties. Therefore making transitions in the manner required by the TRIMs Agreement is no small matter.

The WTO accepts that transition by developing and least developed nations is a complicated matter and takes time. This explains why the TRIMs Agreement is prefaced with the declaration: ‘*Taking into account* the particular trade, development and financial needs of developing country Members, particularly those of the least-developed country

⁴⁹⁹ Haggard, Stephen, 1995, *Developing Nations and the Politics of Global Integration*, Brookings Institution Press, pp. 4 - 5.

⁵⁰⁰ Ibid.

⁵⁰¹ Ibid.

Members...'. In recognition of this, Article 4 of the TRIMs Agreement makes the following provision:

A developing country Member shall be free to deviate temporarily from the provisions of Article 2 to the extent and in such a manner as Article XVIII of GATT 1994, the Understanding on the Balance-of-Payments Provisions of GATT 1994, and the Declaration on Trade Measures Taken for Balance-of-Payments Purposes adopted on 28 November 1979 (BISD 26S/205-209) permit the Member to deviate from the provisions of Articles III and XI of GATT 1994.

As previously noted, Article 2 of the TRIMs abrogates provisions that are inconsistent with Articles III and XI of GATT.

The idea is to allow Member States to make transition adjustments that are consistent with their resources and facilities.⁵⁰² Be that as it may, what is often overlooked is the underlying political influence of an integration agenda. Democratic challenges are difficult to dismiss. Scott Sinclair goes so far as to submit that the WTO aspires to 'restructure the role of governments worldwide'.⁵⁰³ Such a point of view is bred by the trade controls envisioned by the WTO Agreements, particularly the TRIMs, the GATS and the TRIPs.

By their membership of the WTO, states are committing their citizens and governance to a series of agreements into which they have had no specific input. This in itself is an affront to the fundamental concept of democratic institutions, and a cause of democratic

⁵⁰² Mah, JS, 'Reflections on the Trade Policy Review Mechanism in the World Trade Organisation', vol. 31, no. 5, *Journal of World Trade*, 1997, pp. 49-56.

⁵⁰³ Sinclair, Scott, 2000, *How the World Trade Organisation's New Services Negotiations Threaten Democracy*, Canadian Resources for Policy Alternatives.

deficit. In fact, Green Party of England and Wales spokesperson for Globalisation, Jayne Forbes, noted that:

Citizens of the UK have had no input into these discussions and have no right of access to papers or negotiating positions. This is in complete contrast to the open access given to chief executives of large companies and business interest groups of the continent's most powerful corporations.⁵⁰⁴

Although Jayne Forbes spoke with reference to the GATS, that Agreement cannot be distinguished (in regard of her subject) from TRIMs, since both Agreements are characterised by the same secrecy and closed-door negotiations of the WTO dispute-settlement and consultation regime. Forbes goes on to maintain that GATS ‘...fundamentally undermine citizens’ rights to determine their own social and environmental priorities’.⁵⁰⁵ No doubt the same is true of the TRIMs agreement. The time allowed for transition merely disadvantages the developing and least developed nations by pressuring them to restructure internal social and environmental priorities in order to comply with an international agenda rather than a domestic one.

Beyond democratic concerns, a more complex difficulty exists for developing and least-developed nations seeking to conform to TRIMs. The TRIMs Agreement is much insulated, and its brevity poses construction and conformity problems immediately. By comparison, the (now defunct) OECD Multilateral Agreement on Investment (MAI), launched by governments at the Annual Meeting of the OECD Council at Ministerial

⁵⁰⁴ Forbes, Jayne, ‘The Green Party of England and Wales Response to the GATS Consultations’, January 2003, [http://www.greenparty.org.uk/files/reports/2003/1The%20Green%20Party%20Response%20to%20the%20GATS%20Consultation%20\(2\).htm](http://www.greenparty.org.uk/files/reports/2003/1The%20Green%20Party%20Response%20to%20the%20GATS%20Consultation%20(2).htm).

⁵⁰⁵ Ibid.

level in May 1995, encompassed a more specific definition of investment. It included portfolio investments, intellectual property rights, debt capital and other tangibles and intangibles.⁵⁰⁶ Further complicating matters is the fact that the TRIMs cannot be interpreted in isolation. It is necessary to read it together with other WTO agreements and policies, and this is particularly problematic for developing nations.

This necessity speaks for the ambiguity of the TRIMs Agreement that makes the interpretation of its obligations a mammoth task for developing and least developed nations. Many of these nations lack the capacity, in terms of resources and expertise, to fully appreciate the actual scope and range of TRIMs obligations. Obviously, this shortfall has the capacity to create unnecessary tensions between developing nations and developed nations, with the result that the WTO's efficiency and integration agenda is significantly compromised.⁵⁰⁷

Some economists and jurists argue that the legal frame-work of the WTO's state-to-state dispute settlement process does a disservice to the TRIMs Agreement, and they recommend instead an investor-to-state mechanism for dispute settlement. However, others argue, and reasonably so, that changing the already-imbalanced dispute settlement regime of the WTO would serve only to further disadvantage developing nations. If they

⁵⁰⁶ Ganesan, AV, 'Strategic Options Available to Developing Countries with Regard to a Multilateral Agreement on Investment', UNCTAD Discussion Paper No. 134, United Nations Conference on Trade and Development, Geneva, 1998.

⁵⁰⁷ Bora, B, 'Trade Related Investment Measures and the WTO: 1995-2001', United Nations Conference on Trade and Development, Geneva 2001.

already lack the expertise to effectively negotiate, they will remain incapacitated by the requirement to elect and sponsor investors.⁵⁰⁸

Others argue that imbalance in WTO negotiating powers among developed and developing states is a necessary evil – an unavoidable side effect of globalisation. If globalisation eliminates poverty, imbalance is a fair trade-off. WTO Agreements are largely viewed as instruments necessary for the improvement of the economic infrastructure of developing as well as least developed nations. In the words of Erin Thomas, managing Editor of *Global Vision* free trade, those agreements are the facility that clears the way for ‘the untaxed flow of goods and services between countries’.⁵⁰⁹ Thomas surmises that it is primarily a lack of international harmony that causes poverty in developing and least developed nations. In fact, he argues, countries engaging in unrestricted trade on an international level are not more economically successful by pure coincidence. On the other hand, countries that maintain a ‘protectionist stance on trade’ suffer from ‘both loss of opportunity and nepotism’.⁵¹⁰

The ‘Make Trade Fair’ campaign launched by Oxfam International in October 2002 had as its agenda the elimination of poverty on a global level. The campaign was characterised by the belief that an open market of the kind envisioned by the WTO in its various agreements, such as the TRIMs, TRIPS and GATS, provides a viable response to world poverty. Oxfam noted that:

⁵⁰⁸ Dunning, JH, ‘Globalization and the New Geography of Foreign Direct Investment’, vol. 26, no. 1, *Oxford Development Studies*, 1998, pp. 47-70.

⁵⁰⁹ Thomas, Erin, ‘Why Free Trade?’, *Global Vision*, 12 December 2005.

⁵¹⁰ Ibid.

For [the] engine [of trade] to function, poor countries need access to rich country markets. Expanding market access can help countries to accelerate economic growth, at the same time expanding opportunities for the poor.⁵¹¹

As Erin Thomas suggests, there is very little argument of merit against the position that free market access is the most effective measure for the elimination of poverty on a global level. Therefore it is obvious that the free and open market agenda envisioned by the WTO is at least in part the answer to world poverty.⁵¹²

However, it remains true that the WTO Agreements need a lot of fine-tuning if they are to achieve the goal of trade liberalisation and economic progress. The TRIMs, for instance, require some comprehensive radical changes, not the least of which is a clear working definition of 'investment'. It is also necessary to make provision for closer attention to the needs and shortfalls of developing and least developed nations, and for the implementation of provisions that go beyond mere extensions of time for transitions and conformity.

5.4 The UAE and WTO commitments

In its Trade Policy Review of the UAE, a review it has not conducted since it published its Review of 24 and 26 April 2006,⁵¹³ the WTO notes that the UAE economy experienced an average growth rate of 6 per cent per annum over the last 10 years. The UAE currently enjoys one of the world's most impressive GDPs, at approximately

⁵¹¹ 'Make Trade Fair', Oxfam International, 2002, <http://www.oxfam.org/en/programs/campaigns/maketradefair/> Viewed September 22, 2007.

⁵¹² Sacerdoti, G, 1995, *The Uruguay Round Results: a European lawyers' perspective*, European Interuniversity Press, pp. 421-427.

⁵¹³ WTO, 'United Arab Emirates' Trade Policy Review', WT/TPR/S/162.

US\$24,000. The economic framework of the UAE is by and large government owned and controlled. Government control is the driving force of UAE trade policies. The Federal Supreme Council, which is made up of seven Emirate representatives, supervises the Ministry of Economy's co-ordination and formulation of UAE trade policies.⁵¹⁴

The UAE has been a signatory to GATT since 1994, and it acceded to the WTO in April 1996. It gives Most Favoured Nation status to each of its trade partners except of Israel, and has never been a party to a WTO dispute.⁵¹⁵ One of the UAE's greatest barriers to international integration is its failure to enact 'competition anti-dumping, subsidies, countervailing or safeguards legislation'.⁵¹⁶

The WTO notes that UAE efforts to diversify its trade activities with a view to benefiting fully from the multilateral trade mechanisms envisioned by the WTO is hampered by 'institutional weaknesses',⁵¹⁷ its lack of competition policies and restraints on foreign investment. The WTO opines that this situation exists in 'contrast with its relatively low border barriers to trade and preclude it from benefiting fully from the advantages of a liberal economy'.⁵¹⁸ The WTO considers also that the UAE's trade policies need revision, particularly its anti-competition policies, to come into conformity with WTO principles. Since it also operates primarily within free zones, tariff reforms are also necessary. This is no simple task, but one that requires a departure from the traditional Emirate collective concepts.

⁵¹⁴ Ibid. p. vii.

⁵¹⁵ Ibid.

⁵¹⁶ Ibid. p. ix.

⁵¹⁷ Ibid.

⁵¹⁸ Ibid.

5.5 Brazil

The primary difficulty for Brazil in the legal framework of the WTO is its lack of transparency. Foreign trade in Brazil is regulated by complex laws, and often by provisional measures that make it difficult for trade partners to keep abreast of its trade regime. This problem is compounded by Brazil's centralised political system, in which the President is empowered to impose *ad hoc* legislative measures as he sees fit.⁵¹⁹

Brazil's socio-economic policies are inward orientated. The emphasis is on encouraging exports and discouraging imports. As a result, import taxes are excessive in comparison to export taxes and tariffs.⁵²⁰ The WTO considers this to be unfair, unbalanced and hostile to foreign trade, and an impediment to Brazil's integration with free global trade, which is not in keeping with the WTO goals of harmonisation and trade liberation. The WTO advises Brazil to revise its imports policy to allow greater market access to WTO Member States, pointing out that once other Member States have better access to the Brazilian market, Brazil's access to international markets will increase, and economic growth will follow.

5.6 Bangladesh

Bangladesh is a country struggling to overcome internal poverty, so conformity with WTO trade policies is a mammoth task for it, and its efforts in that direction appear doomed to failure. Political instability, poor infrastructure and a string of natural disasters

⁵¹⁹ World Trade Organization, 'Brazil Trade Policy Review', WT/TPR/140, November 2000.

⁵²⁰ Ibid.

exacerbate this country's problems.⁵²¹ Its weaknesses increase the costs of trade in all sectors.⁵²² WTO advice is to take 'steps to improve the provision of essential infrastructure services, notably power, telecommunications, transport and port facilities, and strengthen the banking sector as well as measures to enhance governance'.⁵²³

Because the sources of government revenue are few and sparse, this country relies almost entirely on border tariffs. Political instability has brought in a number of inconsistent border taxes and regulations. Consequently, Bangladesh is unable to provide the WTO transparencies required for harmonising cross-border trade systems.⁵²⁴ Another difficulty for Bangladesh is in its heavy reliance on its unitary trade-capable industry, the garment industry. Obviously, diversification cannot be accomplished by fostering an economy that is focused on exports of a single product.

Internal reconstruction of Bangladesh's fiscal regime and government structure is necessarily a priority for Bangladesh. Measures that improve the internal fiscal problems will go a long way towards bringing Bangladesh to a point where it is functioning in manner consistent with the WTO integration agenda. A more stable government will foster confidence in both foreign and domestic investors. Success in attracting investment will reduce this country's balance-of-payment deficit, improvement of its infrastructure will follow automatically.

⁵²¹ World Trade Organization, 'Bangladesh Trade Policy Review', WT/TPR/133 May, 2000.

⁵²² Ibid.

⁵²³ Ibid.

⁵²⁴ Ibid.

5.7 Balance of payments and developing countries

The WTO is said to assist developing nations and least developed nations by allowing them to operate with an unbalanced taxes-and-tariffs system known as ‘balance of payments’. Article 1 of the directive ‘Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994’ provides as follows:

Members confirm their commitment to announce publicly, as soon as possible, time-schedules for the removal of restrictive import measures taken for balance-of-payments purposes. It is understood that such time-schedules may be modified as appropriate to take into account changes in the balance-of-payments situation. Whenever a time-schedule is not publicly announced by a Member, that Member shall provide justification as to the reasons therefor.

Article 2 permits disparity in import and export tariffs and taxes as well as in all surcharges necessitated by internal weaknesses. Problems for many developing nations and least developed nations are created by their failure to notify the WTO of the measures in place to manage this disparity, and to justify those measures. This failure violates the WTO’s policy on transition, as well as its position on transparency. As a result, developing and least developed nations often find themselves the subjects of WTO consultation and dispute settlement proceedings.

5.8 Cost requirements for developing nations

Making the transition from a self-governing economic entity to a WTO-regulated regime comes at both a financial and social cost for developing and least developed nations. As noted previously, in nations such as Brazil and Bangladesh internal restructuring is a necessary prerequisite to transition and open-market access. Transition requires reconstructing policies and practices at home, and the general educating of potential

traders about both internal and international trade rules and policies. In many cases, countries can expect to evolve from a centralised economy to a liberal one. But adaptability is a pre-requisite. Also, changes to internal policies usually presume the availability of external expertise and advice, and this is not a resource usually available to poor countries.

5.9 Towards a legal framework that accommodates developing nations

One of the greatest difficulties for developing nations in adhering to WTO commitments by abandoning WTO-inconsistent legislative provisions and replacing them with compliant ones. There is a general lack of guidance about how this might be achieved with regard to individual agreements. The TRIMs are particularly problematic for their ambiguity and lack of procedural detail. A good starting point for the WTO, if it is minded to be of assistance to developing countries, is a commitment to better clarity and detail in its agreement texts.

As noted previously, many developing nations lack the capacity and resources to interpret and implement WTO agreements as domestic law. Taking a lesson from the EC, the WTO should issue explicit instructions about how and in what timeframe agreements are to be reflected in local law. WTO Member States do not co-exist in the same legislative proximity as do the EC nations, and thus EC-style directives would not be appropriate in the WTO context. But a directive-like explanatory set of instruction is certainly possible.

The WTO dispute settlement process is tortured by secrecy, and for this reason, invites a perception that it is unfair. The process should be open to public scrutiny. That can be would foster public confidence in its fairness. Moreover, open proceedings will have the added benefit of educating WTO Members. The more a Member State knows of the proceedings and the substantive law, the more likely that consultations will end in agreement.

5.9.1 Looking forward to a better WTO

Lack of comity among nations has always constructed stumbling blocks in international relations. Any attempt to regulate international relations by public international law has always been met by expressions of fear for national sovereignty. However, the Treaty of Rome that formed the European Economic Community has led the way for the unification of nations by promoting the free movement of goods, people and services while maintaining some element of domestic control over domestic policies. The WTO has a similar agenda, but it falls short in the construction of its defining agreements.

The WTO is flawed in that its Agreements call for commitment rather than impose rules and regulations. Yet the WTO seeks to exert far too much control over governments, sometimes at the expense of cordial international relations. Governments are the best bodies for regulation of internal policies and regimes. The overall difficulty with the WTO is that it is too idealistic in its approach and sorely lacking an ability to construct its goals realistically.

Lazar Lydia makes an admirable point succinctly:

Our traditional ‘rational basis’ test for business regulations reflects the give and take of local politics in any particular community – yet under GATS and WTO disciplines, our communities may be prevented from enacting forward thinking legislation to promote sustainability.⁵²⁵

Where the give-and-take to which Lydia refers is such that the affluent WTO Member Nations themselves take far less punishment in the plying of their trade ambitions than they give developing nations, there really is not much hope of realising WTO ideals.

5.10 Conclusion

Even allowing that the WTO is an organisation that operates from a firm footing in high ideals, and that the TRIMs have modified the GATT advantageously, it remains true that the resultant situation is still unsatisfactory for developing countries, especially for the least developed among them. This Chapter illustrated as much with reference to Bangladesh. It illustrated also that local implementation of TRIMs measures is not helped by these agreements’ formal documentation. Rather than help developing countries implement agreements, they frustrate them with uncertainties and technical obscurities. The secrecy of WTO dispute-settlement proceedings does nothing to help in the education of developing nations in negotiation skills. As the outcomes of the EC’s and India’s separated disputes with the US showed, it is negotiation power, not issues at law, that secure successful outcomes. If the developing countries’ present exclusion from the ‘rewards’ of free trade in the global economy is to be remedied, radical changes in the WTO framework, especially to its TRIMs component, are urgently called for.

⁵²⁵ Lydia, Lazar, ‘Sustainability and Democracy’, April 2007, <http://209.85.165.104/search?q=cache:xz5IOxQUTEUJ:www.kentlaw.edu/international/Stories/SustainabilityandDemocracy.pdf+GATS+and+democracy&hl=en&ct=clnk&cd=9&gl=us>.

Chapter 6 will examine the GATS for international law capacity. Attention to the GATS Most Favoured Nation obligation will concentrate on the practical applicability of this legally imperfect concept.

ANNEX to Chapter 5

Appendix A: Illustrative List

1. The TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of the GATT 1994 are those that (i) allow mandatory domestic law or administrative rulings, or (ii) tolerate the eschewing of compliance where trade advantage is available. Examples in practice of inconsistencies regarding national treatment are:

- (a) the enforced purchase or use by an enterprise of products of domestic source, whether the purchase regards specific products or the volumes and values of products;
- (b) penalty imposed upon an enterprise that imports in proportion to the value of that enterprise's export of local products.

2. The TRIMs that are inconsistent with the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 are as (i) and (ii) above. Examples in practice of inconsistencies regarding the elimination of quantitative restrictions are:

- (a) penalties upon the importation by an enterprise of products used in or related to its local production, usually calculated as a proportion of the volume or value of the local produce it exports;
- (b) punishment of importation by an enterprise (of products used in or related to its local production) by the limiting of its access to foreign exchange to an amount in proportion with the foreign exchange inflows that enterprise has achieved;
- (c) pressure brought to bear upon an enterprise to export products or sell products for exportation by another, whether that pressure specify particular products or the volume or value of products, or stipulate that a proportion of the volume or value of its local production be exported.⁵²⁶

⁵²⁶ Agreement on Trade Related Investment Measures, Annex, Illustrative List.

Chapter 6

The General Agreement on Trades and Services:

How It Does and Does Not Help Developing Countries

6.0 Introduction

‘Negotiations on the GATS began on 1 January 2002, as part of the Uruguay Round’s “built-in” agenda.’⁵²⁷ As this comment betrays, the OECD is on the defensive about the effort to liberalise trade in services by means of the General Agreement on Tariffs and Services (GATS).⁵²⁸ It claims, *inter alia*, that the GATS has benefited developing countries more than the developed ones, citing as evidence of this Radesh Chadha’s⁵²⁹ statistical abstraction on the subject, to the effect that:

... gains in welfare (expressed as a percentage of GDP) from a ‘hypothetical’ 25% reduction of a vector of service-sector protection were estimated to represent 1.2% for the United States and Japan, and 1% for the EU. The corresponding values were 3% for the rest of South Asia, 2.9% for ASEAN countries, 2.5% for a group of industrialised economies, and 1.4% for India. The additional gains for OECD countries were relatively higher under services and trade liberalisation than under goods trade liberalisation.⁵³⁰

It is not the intention of this Chapter to query either Chadha’s abstractions or the OECD’s approval of them. But it is too tempting to remark in passing that the final sentence of the text quoted above rather ‘gives away’ that it is, after all of the foregoing, the OECD countries that really benefited from the GATS.

⁵²⁷ OECD, 2002, *GATS: The Open Case for Service Markets*, OECD Publishing, p.13.

⁵²⁸ Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments - Results of the Uruguay Round, vol. 31, 33 I.L.M. 1167 (1994).

⁵²⁹ Chadha, Radesh, 1999, *Gats and Developing Countries: A Case Study of India*, Centre for Advanced Economic Research, New Delhi.

⁵³⁰ OECD 2002, note 462, p.37.

More interesting from this Chapter's discussion perspective is the characterisation the OECD attributes to the GATS: It claims of the GATS operation framework that it:

... features several fundamental principles of the GATT – national treatment, most-favoured nation treatment, transparency in domestic regulation, fair application of laws ...⁵³¹

But the OECD admits that:

The framework is still incomplete, and rule-making efforts on certain issues, such as emergency safeguards, subsidies, government procurement and domestic regulation are still under way.⁵³²

If even the framework is incomplete, then in what sense is the GATS operational as international law? A part of the business of this Chapter is to advance an answer to this question. To that end, it will comment on the architecture of the GATS, giving particular attention to its modes of supply and market-access commitment rules, its most-favoured nation (MFN) principle, and evaluating the legal nature of the obligations it imposes.

The vaunted advantage to developing nations that GATS affords will be challenged in the course of a discussion of the Doha ban on the taxation of goods delivered as e-commerce. The GATS viability as international law will be questioned in the light of this ban, the friction between the 'national treatment' obligation and the 'most favoured nation' concepts, the contention-provoking 'privacy' provisions and the GATS Article XIV(a) chapeau.

⁵³¹ Ibid. p.57.

⁵³² Ibid. p.58.

This Chapter will then look at the GATS-related DSB experiences of the UAE, India, Brazil, Bangladesh and China. It will conclude that Brazil's recent DSB experience might turn out to prove that the GATS, in concert with the TRIPs Agreement and Article 22 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, is capable of contributing substantially to developing nations' ability to enforce DSB rulings that are brought down in their favour.

6.1 The GATS reach, MFN and NT

Two WTO agreements govern the cross-border flows of goods and services: the General Agreement on Tariffs and Trade (GATT)⁵³³ and the GATS. Under WTO rules, the sale of goods is governed by the GATT, and the sale of services by GATS. Most Favoured Nation (MFN) treatment (GATS Article II) is a GATS obligation that extends to all WTO members, and is to be accorded immediately and unconditionally by all member states to all services and service providers as treatment that is no less favourable than that accorded to like services and service providers of any other state. National Treatment (GATS Article XVII) is the requirement that a WTO member state accord to services and service suppliers of other member states treatment no less favourable than what the member grants its own like services and service suppliers. Chapter 8 will look into the legal opacity of the MFN and national treatment principles. For the moment, suffice it to note that the application of neither is clear: As recently as August 2008, the China Environmental Law Blog⁵³⁴ is left to ruminate on whether China may face another WTO

⁵³³ Marrakech Agreement Establishing the World Trade Organization, Annex 1A, 33 ILM 1154 (1994).

⁵³⁴ Todgham Chemjak, Cyndee, 'China May Face Another WTO Case for Big Cat Tax', 15 August 2008, *Trade Lawyers' Blog*, http://tradelawyersblog.com/blog/archive/2008/august/article/china-may-face-another-wto-case-for-big-car-tax/?tx_ttnews%5Bday%5D=15&cHash=808184a29a.

case against it for imposing more tax on big than on little cars. As it happens, its own car, the Cherry, is a little car, but some of the cars of manufacturers who sell vehicles in China are big. These manufacturers might become concerned that China's proposed 'big car tax' measures will discriminate against them. The Chinese tax proposals are very likely to be considered to breach national treatment regulations. And, depending on how they are implemented, they might also be considered in breach China's MFN obligations.

6.1.1 Modes of supply and market-access commitments

Article 1 of the GATS delineates the framework that enables WTO members to specify their levels of market-access commitment according to any one of four particular 'modes' of service supply. Those modes are:

- (2)(a) 'from the territory of one Member into the territory of any other Member' (Mode 1);
- (2)(b) 'in the territory of one Member to the service consumer of any other Member' (Mode 2);
- (2)(c) 'by a service supplier of one Member, through commercial presence in the territory of any other Member' (Mode 3);
- (2)(d) 'by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member' (Mode 4).

Member states must commit to a specific market-access level. To do this, they can: (i) list all restrictions on the provision of services by a particular mode of delivery; or (ii) list the commitment 'none' to any mode of delivery; or (iii) list the commitment 'unbound', which means that a country reserves the right to place restrictions on a mode of delivery. Article XVI(2) (a-f) lists the limitations that member countries cannot impose by their access-level commitments.

6.1.2 The nature of GATS obligations

Joost Pauwelyn⁵³⁵ makes the important point that WTO obligations tend to be bilateral rather than *erga omnes partes* (collectively applicable to all WTO members).

The bilateral nature of WTO obligations is also demonstrated by the fact that GATT and GATS concessions can be *re-negotiated* as between a limited number of WTO Members with a substantial trade interest in the product or sector concerned (pursuant to GATT Article XXVIII and GATS Article XXI).⁵³⁶

He adds:

Unlike breaches of, for example, human rights obligations, a breach of TRIPS, SPS, TBT or GATS obligations *may* (and can) still single out one or more WTO Members without affecting the individual rights of all other WTO Members.⁵³⁷

That, of course, makes possible the ‘GATS+’ kinds of bilateral obligations that countries conclude between themselves as free trade agreements (FTAs). Yet Article XXIII(1) of the GATS seems to give standing to any WTO Member in any event of a GATS breach:

If any Member should consider that any other WTO Member fails to carry out its obligations or specific commitments under this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter have recourse to the DSU.

It is not clear how this can have effect. Not even the MFN principle will infuse Article XXIII(1) of the GATS with a ‘collective obligation’ strength, for its Article V states, with specific reference to the MFN principle, that GATS obligations do not prevent WTO Member from concluding *inter se* agreements that further liberalise trade. At what point, therefore, is the MFN principle violated pursuant to the GATS? Or, does the GATS here

⁵³⁵ Pauwelyn, Joost, ‘A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?’, vol. 14, *European Journal of International Law*, November 2003.

⁵³⁶ Ibid. p.932.

⁵³⁷ Ibid. p.939.

create, as Pauwelyn posits,⁵³⁸ a *lex specialis* under which breaches of WTO obligations (one of which is founded on the MFN principle)⁵³⁹ are in fact permitted? On a view such as Pauwelyn's, WTO Agreements are treated as 'a bundle of bi-lateral relations', and so WTO obligations are subject to the Vienna Convention on the Law of Treaties and the Articles on State Responsibility. Pauwelyn makes an admirable case for the view that the DSU is disposed to think likewise.⁵⁴⁰ One would have to conclude, adopting Pauwelyn's view, that, given a *lex specialis* status, a provision of a WTO agreement that appears to breach a WTO obligation is in fact not such a breach. Despite the obvious excellence of the position Pauwelyn makes out, it remains worrying that even academic positions are contributing to the disappointment of the quite natural expectation that the very purpose of there being a WTO is that it will establish collective (*erga omnes partes*) trade obligations rather than tolerate special, bi-laterally cornered ones.

Carmody⁵⁴¹ does a valiant job of arguing that WTO obligations are meant to be collective ones. But it does appear that their bi-lateral determination is already in effect, given the proliferation of FTAs. That must be difficult to reverse.

6.2 The GATS shortcomings as international law

It is appropriate to acknowledge that the GATS is still 'in the making', and that the collapse⁵⁴² in July 2008 of the Doha Round of WTO negotiations has left the realisation

⁵³⁸ Ibid. p. 947.

⁵³⁹ Article 1 of the GATT.

⁵⁴⁰ Pauwelyn, note 535, p. 945 and p. 949.

⁵⁴¹ Carmody, Chios, 'WTO Obligations as Collective', vol. 17, *European Journal of International Law*, 2006, pp. 419-443.

⁵⁴² BBC News, 'World trade talks end in collapse', 29 July 2008, <http://news.bbc.co.uk/2/hi/business/7531099.stm>.

of its final form in an uncomfortable limbo. All the same, it has been on the international law scene since 1994. Its shortcomings as international law are therefore reasonably illuminated.

6.2.1 The Doha ban

Paragraph 34 of the Doha Ministerial Declaration, adopted on 14 November 2001, is unequivocal about the general WTO ban on the taxation of goods and services delivered as e-commerce:

We declare that members will maintain their current practice of not imposing customs duties on electronic transmissions until the Fifth Session.⁵⁴³

Like the GATT classification system's 'Harmonised System', the GATS classification system, 'Services Sectoral Classification List' (W/120) lacks a clear guideline for classifying digital products. The Fifth Session of the Ministerial Conference left the Doha moratorium in place precisely because of a lack of agreement among Members as to what constitutes a 'service' in e-commerce, and what a 'good'. The WTO has issued this briefing note:

Participants in the dedicated discussions hold the view that the examination of these cross-cutting issues is unfinished, and that further work to clarify these issues is needed.⁵⁴⁴

This is odd, for no classification debate appears to have hindered the TRIPs protection of intellectual property in digital products. This much is obvious in the TRIPS Council's

Background Note by the Secretariat:

⁵⁴³ note 336.

⁵⁴⁴ 'Electronic Commerce: Work continues on issues needing clarification', Cancun WTO Ministerial, 2003: Briefing Notes, WTO website, http://www.wto.org/english/thewto_e/minist_e/min03_e/brief_e/brief15_e.htm.

The issues identified in this connection in the Secretariat background note include the use of trademarks on the Internet, in particular in the light of the territorial nature of trademark rights and their general specificity to particular products or services, the protection of well-known trademarks, and the relationship between trademarks and Internet domain names ...⁵⁴⁵

One would think that deciding whether x is a good or a service poses fewer categorisation problems than deciding whether intellectual property resides in a trademark on the Internet that looks like any number of other trademarks.

It is argued that regardless of the WTO rhetoric about the free access for developed countries to e-commerce that this moratorium affords, the moratorium is no more than a political commitment by WTO Members that cannot be legally enforced in the WTO dispute settlement system.⁵⁴⁶ Another observer adds that the moratorium is effective by default: even if it were possible for taxation authorities to trace and value e-commerce transactions, the cost of the task would outweigh the size of the revenue that would accrue from their taxation.⁵⁴⁷

A further diminution of the significance for developed countries of the Doha moratorium comes from Scott Budnick.⁵⁴⁸ Upon his case study of the small West African state, Burkina Faso, Budnick concludes that though this state has some cause for concern about

⁵⁴⁵ TRIPS Council, Background Note by the Secretariat, Work Programme on Electronic Commerce: Addendum, IP/C/W/128/Add.1, 15 May 2003, para. 7, <http://lists.essential.org/random-bits/msg00183.html>.

⁵⁴⁶ 'US looks for WTO Guidelines on E-commerce by Cancun Ministerial', *Inside U.S. Trade*, 20 September 2002.

⁵⁴⁷ General Council, Communication from Australia, *Work Programme on Electronic Commerce*, WT/GC/25, 5 July 1999.

⁵⁴⁸ Budnick, Scott, 'Internet Taxation and Burkina Faso: A Case Study', vol. 10, no 549, *ILSA Journal of International and Comparative Law*, 2004.

the fact that it is losing tariff revenue to the tax-exempt e-commerce trade, that revenue loss is almost inconsequential. Says Budnick:

Although in percentage terms the present WTO ban results in larger revenue losses for Burkina Faso relative to percentage losses of developed countries, the amount of online business conducted by Burkina Faso dictates that these losses comprise at best a marginal share of total government tax revenue.⁵⁴⁹

In the same breath, he makes the rather startling claim that:

[t]he potential loss of related tariff, surcharge, and consumption revenue stemming from the WTO ban as a percentage of total tax revenues amounts to less than 1%. This percentage does not lead to the conclusion that the ban's continuance will irreparably harm national internal development. These numbers suggest that developing countries will not necessarily be harmed in the future by current international policy.

This is a surprising conclusion, for he has conceded that:

[g]enerally, the internal tax structure of a developing economy differs from that of a developed economy in the sense that import tariffs and taxes comprise the majority of government revenue ...⁵⁵⁰

and that:

The UNCTAD study, based largely upon the work of Dr Teltscher, lists Burkina Faso's total revenues stemming from tariffs on digitised products at \$ 3,567,000 (U.S.) According to the IMF's Statistical Annex for Burkina Faso, the average exchange rate listed for Burkina Faso in 1999 was 614.9 CFAf per U.S.\$.

Accordingly, in US dollars, these same receipts translate to 2,193,348,300 CFAf in losses for Burkina Faso. For the same year, the IMF lists total tax revenues generated by Burkina Faso at 220,744,000,000 CFAf. Thus, to place these lost tariff revenues into context, simple math indicates that they total less than 1% (.0099%) of Burkinabe tax inflows.⁵⁵¹

This data seem to anticipate the conclusion that Burkina Faso loses quite significantly as a result of the WTO ban on levying tariffs on the import of digitised products. It is

⁵⁴⁹ Ibid. p. 568.

⁵⁵⁰ Ibid. p.562.

⁵⁵¹ Ibid. p.568.

therefore difficult to account for Budnick's actual conclusion to the effect that the loss is negligible for Burkina Faso. *Can* a 1 percent loss in taxation revenue be negligible in any society, let alone in one where 'the majority of tax revenue' is generated from the taxation of imports? One must doubt it. And what does Budnick mean by his claim that 'these numbers suggest that developing countries will not necessarily be harmed in the future by current international policy'? Not only does he generalise, without the least attempt at justification, his Burkina Faso statistics to the whole group of 'developing countries', but he also tenders the decidedly cryptic prognosis: 'will not *necessarily* be harmed'. One cannot, surely, dismiss 'harm to the economy' as the necessary consequence of the loss, for the foreseeable future, of 1 percent of a state's revenue base.

Budnick's none-too-trivial attempt here, as he admits by reference, is to diminish the impact of Susanne Teltscher's work⁵⁵² on this issue. Teltscher notes four very important things: (i) that 'the main players in the debate on e-commerce taxation have been the United States, the EU and the OECD'; that (ii) 'developing countries have participated little in these debates', and 'OECD countries have given little consideration to developing countries' concerns.'; that (iii) before the WTO ban, 'the ten countries levying the highest tariff rates on digitisable products are Bangladesh, India, Pakistan, the Solomon Islands, Egypt, Burkina Faso, Morocco, Tunisia, Congo, and Thailand'; that (iv) the majority of countries most affected by tariff revenue losses come from the developing world, for government revenues from import duties account for only 2.6 percent in developed countries, but for 15.8 percent in the developing countries.

⁵⁵² Teltscher, Susanne, 2000, 'Tariffs, Taxes and Electronic Commerce: Revenue Implications for Developing Countries', United Nations Conference on Trade and Development, Policy Issues in International Trade and Policies, Study series No.5, http://192.91.247.38/tab/pubs/itcdtab5_en.pdf.

These facts speak for themselves, saying nothing less than that the developing world's governments have the most to lose from the WTO ban, and that they had the least 'say' in the imposition and maintenance of that ban.

Qua international law, the GATS rates as nothing at all as promoter of an international taxation system. The Doha ban on the taxation of goods delivered by e-commerce really has next-to-nothing to do with it: that ban is merely a WTO edict. And, if Sacha Wunsch-Vincent⁵⁵³ is to be believed, that edict itself was driven, and continues to be maintained, by a US digital trade agenda.

Wunsch-Vincent alleges that a distinct and identifiable US trade policy is the liberalisation of trade in services 'that can be delivered across borders electronically'. Accordingly, in 2002 US Congress enacted the Bipartisan Trade Promotion Authority Act,⁵⁵⁴ The resultant new body, Trade Promotion Authority, has instructed the United States Trade Representative (USTR) to 'conclude trade agreements that anticipate and prevent the creation of new trade barriers that may surface in the digital trade environment'. The pertinent provisions of this Act are contained in sections 2102(b)(2), 2102(b)(7)(B), 2103(d), 2102(b)(8) and 2102(b)(9). Other US domestic legislations, like the 1998 Internet Tax Freedom Act, also call for 'action to minimise the rise of barriers to e-commerce in international trade-negotiation fora like the WTO'.

⁵⁵³ Wunsch-Vincent, Sacha, 'The Digital Trade Agenda of the US: Parallel Tracks of Bilateral, Regional and Multilateral Liberalisation', *Institute for International Economics*, 2003, <http://www.iie.com/publications/papers/wunsch0303.pdf>.

⁵⁵⁴ Public Law 107-210.

Wunsch-Vincent proceeds to surmise that the US is not inclined to see certain electronic products, especially those that currently fall into the ‘audio-visual services’ category, given ‘the GATS treatment’ by individual states. That is, the US does not what to see the possibility of their re-classified as services subject to ‘general obligation’ and ‘national treatment’ exemptions. Hence, Wunsch-Vincent suggested presciently, the technical problem of classification that maintains the moratorium on e-commerce taxes will survive to the Fifth Ministerial Conference (Cancun) and beyond. As we now know, that has indeed happened. And what is more, Cancun confirmed the Doha ban on e-commerce taxation. With a prescience that is almost uncanny, Wunsch-Vincent opined thus, when the Doha Round had barely begun:

... in Cancun US negotiators may well focus only on obtaining another temporary duty-free moratorium on electronic transactions and positive statement from the WTO about the importance of free-trade principles and rules to the development of global e-commerce.

That, of course, is exactly what happened. Nothing demonstrates better than this ‘classification’ saga that power politics rather than the rule of law ‘count’ in the WTO law-making process.

6.2.2 The ‘national treatment’ obligation and the ‘most favoured nation’ status

One of the GATS general obligations is to provide ‘national treatment’ to non-national providers of services. This is laid out by Articles XVI-XVIII. Article II lays out the ‘most-favoured-nation’ treatment.

A very adroit point of William Thomas Worster⁵⁵⁵ is that there is a discrepancy between (i) the narrow reading of the fourth mode of provision of services as laid out by Article I(2)(d) of the GATS, and (ii) the reading of that provision by the Council on Trade and Services (the Council), the body that oversees the operation of GATS. According to that Council's statement,⁵⁵⁶ Worster tells us, 'in order to qualify for Mode Four the natural person must be linked to a corporate commercial presence, excluding self-employment'. Worster notes also that, pursuant to its Article I(2)(d), that is, the Mode 4 provision, 'the benefits of the GATS must be extended to natural persons of a Member in the territory of any other Member'. This is a worrying discrepancy, for it invalidates the GATS 'letter of the law' provision.

Worster's further point is that the Council has remarked that 'general immigration legislation (visa requirements, etc.)' are 'beyond the scope of the GATS'.⁵⁵⁷ Council made this remark 'despite the fact that the DSB had already addressed the issue of applicability in the one DSB dispute involving United States immigration and visa policy'.⁵⁵⁸ So, since 'the DSB demonstrated that it will entertain disputes over immigration and visa issuance policies', as Worster rightly remarks, does or does not the scope of the GATS extend to a country's immigration policy? The confused picture of which Worster noted the emergence is hardly the stuff of the 'rule of law' condition to

⁵⁵⁵ Worster, William Thomas, 'Conflicts Between United States Immigration Law and the General Agreement on Trade in Services: Most-Favoured-Nation Obligation', vol. 42, no. 55, *Texas International Law Journal*, 2008.

⁵⁵⁶ Special Session of the Council for Trade in Services, Report of the Meeting Held on 3-6 December 2001, Note by the Secretariat, S/CSS/M/13, February 26, 2002, <http://docsonline.wto.org/DDFDocuments/t/S/CSS/M13.doc>.

⁵⁵⁷ *Ibid.* para. 143.

⁵⁵⁸ Request for Consultations by the European Communities, United States - The Cuban Liberty and Democratic Solidarity Act, WT/DS38/1 (May 13, 1996), and associated documents.

which international law should aspire. And what, if not such a law, is it? (This must remain a rhetorical question, for this writer could answer it only in quite intemperate pejoratives.)

6.2.3 The ‘privacy of individuals’

Article XIV of the GATS, its ‘general exception’ clause, allows WTO members to restrict commerce when there is a need to protect ‘the privacy of individuals’. The basic conditions for the invocation of article XIV is that the contemplated restriction be ‘necessary to secure compliance with laws’. Trade panels have long linked the term ‘necessary’ with the requirement that when Article XIV is invoked, the ‘least trade-restrictive’ means be sought in its application.⁵⁵⁹ And application must not be such that it would ‘constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services’. Nevertheless, this Article did not prevent an extended dispute between the United States and the European Union over the regulation of data-privacy protection.⁵⁶⁰

The European Commission issued a parliamentary directive⁵⁶¹ on data protection, bringing down comprehensive guidelines concerning the collection, storage, retrieval and dissemination of personal data available on the World Wide Web. This directive sets out the minimum standards of Internet privacy legislation that EU member states must meet.

⁵⁵⁹ E.g.: *Thailand–Import Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R - 37S/200, 7 November 1990, para. 75.

⁵⁶⁰ Johnson, Mark, ‘As Seen from Europe: A Very Public War Over Privacy’, *Global Finance.*, January 2001, pp. 109-121.

⁵⁶¹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (EU).

Inter alia, it prohibits the processing and collecting of personal data of a sensitive nature (about a person's political or religious persuasion, sexual orientation, ethnic origin) without the owner's consent, unless urgent medical or legal circumstances validate it. Also, and most irritatingly for the US, it prohibits the transfer of personal data outside of the EU without assurance of the 'adequate' level of its protection.⁵⁶² This directive empowers EU citizens with a 'breach of privacy' cause of action. However, in July 2000, the European Commission ruled that the American Safe Harbour Privacy Principles meet the protection standards outlined by the this directive.⁵⁶³ A Safe Harbour program was introduced in the US in 2000, but companies were slow to embrace its terms.⁵⁶⁴

Article XIV(c)(ii) of the GATS addresses the privacy issue and provides thus:

... nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures ... (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to ... (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts ...

Quite what the import of these words is has not been clarified. The EU-US squabble never came before the WTO DSB, so there is no Panel decision concerning Article XIV(c)(ii). That is, no regime-specific WTO interpretation of it has been handed down. Commentators therefore resort to interpretation by analogy, taking as analogous Article XX of the GATTs, which contains the exceptions from the application of WTO rules.

Several decisions have been handed down on that head of WTO law. Some of those are:

⁵⁶² Ibid. Article 25.1.

⁵⁶³ Pouillet Y. 'The 'Safe Harbour Principles: An Adequate Protection?', International Colloquium, *IFCLA*, Paris, 15-16 June, 2000, pp.9-13, <http://www.bileta.ac.uk/03papers/perez.html> 31/03/2005.

⁵⁶⁴ Thibodeau, Patrick, 'Big Companies Shy Away from Safe Harbour Accord', *Computerworld*, 19 February 2001, p.18.

Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes;⁵⁶⁵ *United States – Standards for Reformulated and Conventional Gasoline*;⁵⁶⁶ *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*;⁵⁶⁷ *United States – Import Prohibition of Certain Shrimp and Shrimp Products*;⁵⁶⁸ *European Communities - Measures Affecting the Prohibition of Asbestos and Asbestos Products*;⁵⁶⁹ *United States - Restrictions on Imports of Tuna*.⁵⁷⁰ These commentators argue the analogy will yield insight into what might be the parameters to consider in the application of an exemption from WTO rules, what are the premises of the ‘necessity’ test, what ‘non-discriminatory application’ and ‘chapeau’ mean, and so on.

Even if these commentators are right in their conjecture that the GATT Article XX exemptions will yield insight into the application of the GATS ‘privacy’ exemption ((Article XIV(c)(ii)), it remains far from clear that the WTO is a competent forum for the development of a global norm of privacy. For one thing, the possible application of Article XIV(c)(ii) of GATS is hedged around with legal demands that might have the effect of paralysing it. A country cannot be considered for exemption under this article unless it has made a commitment to a particular service sector:

It is only by reference to a country's schedule, and (where relevant) its MFN exemption list, that it can be seen to which services sectors and under what conditions the basic principles of the GATS -market access, national treatment and MFN treatment — apply within that country's jurisdiction. The schedules are complex documents in which each country identifies the service sectors to which it will apply the market access and national treatment obligations of the GATS

⁵⁶⁵ DS10/R - 37S/200, Panel Report, 7 November 1990.

⁵⁶⁶ WT/DS2/R, Panel Report, 29 January 1996.

⁵⁶⁷ WT/DS161/R and WT/DS169/R, Panel Report, 31 July 2000.

⁵⁶⁸ AB-1998-4, WTO Appellate Body Report, 12 October 1998.

⁵⁶⁹ WT/DS/135, Panel Report, 25 July 2000.

⁵⁷⁰ DS21/R, 39S BISD 155, Panel Report, 16 August 1991.

and any exceptions from those obligations it wishes to maintain. The commitments and limitations are in every case entered with respect to each of the four modes of supply which constitute the definition of trade in services in Article I of the GATS: these are cross-border supply; consumption abroad; commercial presence; and presence of natural persons.⁵⁷¹

Then there is the MFN exemption of the Annex to Article II, which allows a country to live with a certain measure of inconsistency with its service-sector commitments:

It is a basic principle of the Agreement that specific commitments are applied on an MFN basis. Where commitments are entered, therefore, the effect of an MFN exemption can only be to permit more favourable treatment to be given to the country to which the exemption applies than is given to all other Members. Where there are no commitments, however, an MFN exemption may also permit less favourable treatment to be given.

Given this, the above WTO attitude to exemption and the consequent disabling of Article XIV(c)(ii) in countries that do have a privacy legislation and have made no commitment to a particular service sector, one must be excused for venturing the opinion that the WTO is little interested in developing a global norm of privacy, and is in fact content to allow the European Commission's Directive 95/46/EC to live, extra-jurisdictional though its ambit is.

Hopes for the success of a GATT XX/GATS XIV(c)(ii) interpretive analogy fade even further when one considers Intan Ramli's point that there is:

... nothing in the wording of the chapeau, (or any other part of Article XX) to suggest that a nation must first secure agreement by WTO members or any other nation before exercising its rights under Article XX(g).⁵⁷²

⁵⁷¹ WTO, 'Guide to reading the GATS schedules of specific commitments and the list of article II (MFN) exemptions', http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm.

⁵⁷² Ramli, note 376, p. 262.

Indeed, the Panel Report in the *Shrimps–Turtles* case noted of the Article XX chapeau that it is ‘but one expression of the principle of good faith’.⁵⁷³ The interpretative analogy therefore has little, if anything, to lean on. Even if it there were substance in it, it would have to bow to a finding that no ‘rule of law’ force can be breathed into the GATS Article XIV(c)(ii), and therefore, that a global norm of privacy has no legislative basis in the WTO regime.

There being no global norm of privacy, and alongside that vacuum there is the EU Directive 95/46/EC and the EU/US Safe Harbour co-operation, it is just possible that Under Mode 2, a developing country can regulate against a regulations such as the EU privacy law. But the odds are stacked against the possibility of Mode 4 extension of the benefits of the GATS to natural persons of a Member in the territory of any other Member’, particularly since the Council has made clear that it will not have the GATS reach into visa applications, etc. If the text of the law appears to say one thing, and the Council another, then the ‘fair application of laws’ principle of the GATS is betrayed by its own Keeper.

More directly affecting developing and least-developed nations, the ‘free movement of peoples’ promise of the GATS is unequivocally withdrawn. Their citizens need not hold out hope for improving their own economic conditions, and of their countries’, by seeking employment in a developed country. A real-world lesson in this matter delivered itself in the EU very recently. Several reports have noted the healthy effect on the individual lives of young Poles who left Poland and its then-struggling economy to work

⁵⁷³ *Shrimp –Turtles*, note 294, para 158.

in Western Europe. One reports⁵⁷⁴ that ‘migrants sent 40 billion zlotys, or US\$18 billion, home in 2007’. That cannot but have contributed to the current healthy signs of the recovery of the Polish economy. If the GATS and its developed-nation signatories were truly committed to improving the lot of developing and least-developed countries, that combination would fully exploit the ‘freedom of movement of labour’ inclination that Article V *bis* intimates:

This Agreement shall not prevent any of its Members from being a party to an agreement establishing full integration of the labour markets between or among the parties to such an agreement ...’.

6.3 Public morals and the GATS Article XIV chapeau

Article XIV(a) of the GATS contains the ‘public morals’ exemption clause:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures ... necessary to protect public morals or to maintain public order.

Annex 1 contains a list of the morality-related import restrictions. The dimensions of the clause were examined in the *US Gambling* case.⁵⁷⁵ This case was brought before the DSU, pursuant to its Article 21.5, by Antigua and Barbuda, following the US enactment of set of domestic laws banning cross-border gambling. By the time this complaint was filed, Antigua had developed a large internet-based offshore gaming industry.

⁵⁷⁴ Dougherty, Carter, ‘Polish émigrés are returning home, posing a challenge for the economy’, *International Herald Tribune*, 17 June 2008.

⁵⁷⁵ *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, (Panel Report) WT/DS285/RW, 30 March 2007.

Antigua argued that the United States ban exceeds what is a ‘necessary’ exception from its GATS commitments, and that therefore the ban fails to satisfy the GATS Article XIV *chapeau* that any measure taken to protect public morals must be non-discriminatory. This is so, Antigua maintained, because the ban denies Antiguan providers of the market access it allows US providers.

The Panel Report makes this explicit statement of what the Panel did *not* find:

It is true that the Appellate Body found that the United States had demonstrated that the measures at issue were ‘justified’ under paragraph (a) of Article XIV of the GATS. However, this was *not* a finding on Article XIV in its entirety. The Appellate Body expressly confirmed that Article XIV contemplates a ‘two-tier analysis’ – first, under one of the paragraphs of Article XIV, and then under the *chapeau*. There was no finding that the measures were consistent with the *chapeau* or with Article XIV in its entirety nor, hence, with the United States' obligations under the GATS ...⁵⁷⁶

(‘Measures’ in this text refers to the set of US domestic legislations that Antigua claimed were in breach of the GATS.) And it makes another explicit statement about what the final Panel does find:

United States has not demonstrated that it applies its prohibition on the remote supply of these services in a consistent manner as between those supplied domestically and those that are supplied from other Members. Accordingly, we believe that the United States has not demonstrated that it does not apply its prohibition on the remote supply of wagering services for horse racing in a manner that does not constitute 'arbitrary and unjustifiable discrimination between countries where like conditions prevail' and/or a 'disguised restriction on trade' in accordance with the requirements of the *chapeau* of Article XIV.⁵⁷⁷

⁵⁷⁶ Ibid. para. 6.29, pp.14-15.

⁵⁷⁷ Ibid. para 6.71.

Put simply, the outcome of this case was that the US set of legislations passed the ‘necessity’ test.⁵⁷⁸ That is, those legislations were demonstrated by the US to be necessary for the protection of public morals. But those legislations did not satisfy the chapeau, for they are either ‘discriminatory between countries where like provisions prevail’, or they constitute a ‘disguised restriction on trade’.⁵⁷⁹ The particularly offending legislative provision was s.3001–07 of the *Interstate Horseracing Act*,⁵⁸⁰ which was deemed to have the potential to exempt companies supplying remote gambling services, but not foreign companies that did the same thing, from compliance with the body of US ‘public-morality protecting’ laws regarding gambling. Failing the chapeau leg of the compliance test, the US is in breach of its commitment under Article XIV of the GATS. No issue can be taken with this exemplary analysis of the application of Article XIV of the GATS.

For reason of the present writer’s admiration as just declared, it is a little uncongenial to contend with criticisms of the *US Gambling* case on the sort of nebulous ‘doctrinal questions’ grounds that Mark Wu⁵⁸¹ raises. For instance, Wu wants of the DSB Panel a definition of public morality along the lines of Universalism or Unilateralism. He claims that without such a definition, and indeed even with one, the following question is left open: ‘To what extent must other nations agree that a particular topic is an issue of public morality before a nation can enact a trade restriction to protect it?’⁵⁸²

⁵⁷⁸ Ibid. para 6.29.

⁵⁷⁹ Ibid. para 6.71.

⁵⁸⁰ 15 USC §§ 3001–07 (2000).

⁵⁸¹ Wu, Mark, ‘Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine’, vol. 33, no. 215, *Yale Journal of International Law*, 2008.

⁵⁸² Ibid. pp.231-233.

In fact, this question does not even arise. The original Panel did, as Wu notes, canvas the international scene for moral attitudes to gambling, and it conscientiously studied GATT-generated prior ‘public morality’ cases. But it did not do this in quest of any ‘extent’ of inter-nation agreement about whether gambling is or is not ‘an issue of public morality’. Indeed, the Panel showed no inclination to measure the ‘necessity’ of the public morality concerns of the US legislations in terms of who else considers such legislations necessary. Had it done so, it would have loaded Article XIV of the GATS with a doctrinaire awkwardness that it mercifully does not have, and as international law, has no business to have.

Wu’s question that precedes this one is almost puerile: ‘...can a government simply declare without proof that a restriction serves to protect a public moral?’ The simple answer is: Yes: it can, if it has dictatorial powers; and no, it cannot, if it is the accountable government of a democracy. And Wu forgets that the Panel was not looking at what a government can or cannot do with the intention of protecting public morality. It was looking at what constitutes compliance with Article XIV of the GATS. This case should imbue developing nations with the confidence that Article XIV of the GATS has an application that enables them to protect their international commercial interests against anti-competitive markets.

6.4. The GATS-related experiences of developing countries

The following survey of the GATS experiences of five developing countries: the UAE, India, Brazil and China, and of Bangladesh, a least-developed country, will point to the

enthusiasm of India and Brazil for bringing cases before the WTO DSB, to the lack of interest on the part of the UAE for doing so, the singularity of Bangladesh in being the only least-developed country ever to bring a case before the DSB, and the reluctance of China to be DSB active. It will become apparent that reasonable comparison is available only between India and Brazil. Both these countries find considerable scope in the GATS for pursuing their trade interests. The economies and international relations of the UAE and Bangladesh are each so different, in their distinct and again-incomparable ways, that no broad lines of collective comparison can be drawn sensibly. Though China does bear comparison with India and Brazil for the similarity of these three countries' economies, China's inclination to avoid dispute is at least in part explained by its fear of losing markets.

6.4.1 The UAE

Edward Sebastian gives a perspicacious account of the contribution of the Gulf Cooperation Council's (GCC) highly positive activism. This organisation, created in 1981 by Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and United Arab Emirates, made its goals economic reform and the integration of their primary common concern. By 2002, the GCC had become the fifth-largest US trading partner worldwide, and US sales of goods and services to the GCC now exceeded US\$20 billion annually,⁵⁸³ and UAE exports to the United States rose by 38 percent between 2000 and 2007, from \$971.7 million to \$1.339 billion.⁵⁸⁴

⁵⁸³ Edwards, Sebastian, 'Capital Mobility, Capital Controls and Globalization in the Twenty First Century', vol. 579, no 261, *The Annals of the American Academy of Political and Social Science*, 2002, pp. 261 -270.

⁵⁸⁴ Ibid. p. 269.

Several of the UAE's Free Zones were in place well before GATS become operational, and they have increased markedly since the UAE joined the GATS in 1994.⁵⁸⁵ Import restrictions are few, and import permits are required only for firearms. Foreign suppliers of goods are free to supply local importers directly in low volumes, but they need a local commercial agent to represent them when their import activities are sustained and high volume. Import and export licences are not required. No taxation is levied on companies operating in the UAE, except upon oil and gas companies and foreign banks. This state of affairs was readily receptive of the GATS.⁵⁸⁶

No DSB threat looms against the UAE from any WTO member. That the country's GATS compliance is healthy can be concluded readily from this. Further evidence is in the fact that the US and the UAE have been negotiating a bilateral free-trade agreement since March 2005. It is still in progress (having become derailed in 2006 over the proposed purchase by Dubai Ports World of US port operations) and remain amicable. But one problem seems to be that the US wants greater access to the UAE's telecommunication and financial-service industries, while the UAE regulators of both industries are not amenable to this, and another that US statutory requirements of FTAs cannot accommodate the UAE's restrictions on trade associations.⁵⁸⁷

⁵⁸⁵ Hejmadi, Santosh, 2004, *Marketing Dubai: Technology and Media Free Zone*, BRAC Centre, pp. 7-9.

⁵⁸⁶ Library of Congress, Federal Research Division, 'Country Profile: United Arab Emirates', July 2007, p. 11, <http://lcweb2.loc.gov/frd/cs/profiles/UAE.pdf>.

⁵⁸⁷ Ibid.

Al Aidarous⁵⁸⁸ thinks that there is a ‘national treatment’ issue in the law governing the UAE’s telecommunication and financial-service industries that might be in breach of the MFN requirement of Article II of the GATS. Article 3 of the UAE’s Agency Law requires an active agent’s registration with the UAE Ministry of Economy & Commerce, part of which registration requirement is that the agent be a 100% UAE national. Failing registration, an agent operates illegally. It is nonetheless highly improbable that any part of the GATS can be read as a requirement that WTO members open their tertiary industries to foreign agencies when they have formally excluded those agencies by statute from those industries.

On the authoritative analysis of Rudolf Adlung and Martin Molinuevo, trade access to which Article I(2)(c) refers is a Mode 3 sort of access of the service supplier of one Member, through the commercial presence in the territory of any other Member’. Pursuant to Article XXVIII(d), a commercial presence is ‘any type of business or professional establishment, including through the constitution, acquisition or maintenance of a juridical person, or the creation or maintenance of a branch or representative office within the territory of a Member for the purpose of supplying a service’.⁵⁸⁹ Now, if ‘juridical person’ is not afforded to a commercial presence, then there is, in terms of the GATS, no lawful presence. In any case, the US in particular would have no DSU ground

⁵⁸⁸ Al Aidarous, Ali, ‘Compatibility of UAE Agency law with GATS 1994’, Conference on Commercial Agencies under the WTO Agreements, Organized by: Dubai Chamber of Commerce & Industry Dubai, UAE, on 23rd March 2005, <http://www.alialaidarous.com/en/cmsDocument.asp?menu=side&menuid=64&DocumentID=52>.

⁵⁸⁹ Adlung, Rudolf and Molinuevo, Martin, ‘Bilateralism in services trade: is there fire behind the (BIT-) smoke?’, *Journal of International Economic Law*, 2008, p.371.

pursuant to the GATS, following its blocking of the Dubai Ports World, that the UAE does not also have.

6.4.2 India

The GATS is of central importance for India, where the service sector accounts for more than 50 percent of the GDP and over 25 percent of trade.⁵⁹⁰ India is also keenly interested in exporting skilled labour, and in hosting services in accordance with the Mode 3 mode of access to trade. This country is minded to offer greater Mode 3 market access (commercial presence) in return for improved Mode 1 market access (cross border supply) and Mode 4 market access (presence of natural persons). Not surprisingly, therefore, India is very protective of its access to foreign markets. It complained strenuously about Turkey's imposition of quantitative restrictions on imports of a broad range of textile and clothing products, claiming that those measures are inconsistent with Articles XI and XIII of GATT 1994. In the famous WTO case, *Turkey–Textiles*,⁵⁹¹ India obtained the ruling that that Turkey's measures are inconsistent with Articles XI and XIII of GATT 1994. Turkey argued that Article XXIV of the GATT provides a waiver from the obligations under Articles XI and XIII of GATT.⁵⁹² Pursuant to her customs union with the European Communities, Turkey considered herself entitled to maintain import restrictions on the same 19 categories of textiles and clothing that the EC maintains.⁵⁹³ However, the Panel's view was that:

While the European Communities also maintains restrictions against imports from India on the same 19 categories at issue, it does so pursuant to its "Council

⁵⁹⁰ World Trade Organisation, *International Trade Statistics* 2003.

⁵⁹¹ *Turkey–Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, 31 May 1999.

⁵⁹² *Ibid.* para 5.5.

⁵⁹³ *Ibid.* para 9.29.

Regulation (EEC) 3030/93 on common rules for imports of certain textile products from third countries", adopted by the Council of the European Communities on 12 October 1993. This regulation applies only to the European Communities' customs territory.⁵⁹⁴

This was a landmark decision, for it indicated, at least by implication, that regional trade agreements, but not customs unions, accommodate the waiver of obligations pursuant to Article XXIV of the GATT. There is, therefore, on WTO jurisprudence, a concept of the degrees of strength of Regional Trade Agreements (RTAs). Since Article V of the GATS faithfully mirrors Article XXIV of the GATT, it is reasonably presumed that a notional Turkish defence under the GATS provision would also have been unsuccessful.

Much like Article XXIV of the GATT, Article V of the GATS stipulates that RTAs covering trade in services must have 'substantial sectoral coverage'. However, there is formal acknowledgment⁵⁹⁵ of the fact that there is yet to be a decision on just how much 'sectoral coverage' there is to be before that coverage is considered 'substantial'. The Panel in *Turkey–Textiles* was silent on this matter. Yet it gave India a substantial 'win' over Turkey. Good though this was for India (and, of course, bad for Turkey) the key point is that there is, since this case, a DSB jurisprudence on the subject, yet a WTO-sanctioned body is still deliberating the meaning of a concept (central coverage) germane to it.

In any case, this has not dampened India's belief in the efficacy of the WTO DSB. Nor is India's WTO compliance free of other Members' scrutiny. To date, India has been the

⁵⁹⁴ Ibid. para 9.39.

⁵⁹⁵ Negotiating Group on Rules, Compendium of Issues Related to Regional Trade Agreements, pp. 13-21, TN/RL/W/8/Rev., 1 August 2002.

complainant in 17 cases, the respondent in 20, and a third party in 51.⁵⁹⁶ Interestingly, Usha Balasubramaniam identifies a GATS opportunity for India's aviation industry.⁵⁹⁷ She notes that 'most aviation regimes are not GATS compatible ... Nations are reluctant to apply the MFN clause for the granting of market access while exchanging traffic rights',⁵⁹⁸ and points to the existence of a 'GATS Reference Paper produced by the WTO',⁵⁹⁹ that 'lays out some competition principles in the Telecom Service Sector Annex that can be adopted as a prototype for creation of similar rules in the Air Transport Annex'.⁶⁰⁰ She stops short of actually saying so, but her discourse implies that she is commending a GATS-compatible Indian aviation industry with a view to using that as the platform for gaining market access to aviations industries other than India's own. This is a curious confidence in the GATS, for it is difficult to imagine it gaining the strength that would enable demands for market access to states' key industries, such as their oil and the aviation industries. Yet Balasubramaniam notes correctly that the GATS framework does make that level of market access at least theoretically possible. One must wonder, however, how much trade liberalisation a state can accommodate before it becomes conscious of a threat to its national security. (What for instance, would happen in the UAE if Exxon Mobil were to pursue an interest in setting itself up there? That the pursuit of this interest would not be encouraged is surely a foregone conclusion.)

⁵⁹⁶ WTO web page, 'India and the WTO', http://www.wto.org/english/thewto_e/countries_e/india_e.htm.

⁵⁹⁷ Balasubramaniam, Usha, 'Market Access and the GATS Transport Annexure: Possible Approaches for India', vol. 72, no 45, *Journal of Air Law and Commerce*, 2007.

⁵⁹⁸ Ibid. p. 57.

⁵⁹⁹ GATS Reference Paper, 36 I.L.M. 354, 367.

⁶⁰⁰ Balasubramaniam, note 596, p. 58.

6.4.3 Brazil

Sidney Weintraub has remarked that Brazil considers itself the leading nation in Mercosur, the customs union of Brazil, Argentina, Paraguay and Uruguay.⁶⁰¹ It is therefore self-confident in the international trades and services context, a fact it displayed in its rejection of the US offer of a Free Trade Agreement in favour of an Interregional Framework Cooperation Agreement with the EU.⁶⁰² There is therefore a clear sense in which Brazil has put herself into an ‘eye of the GATS storm’ situation. This country is, however, doing remarkably well in that position, as its DSB success in the *Upland Cotton* case⁶⁰³ attests. Brazil requested consultation in the matter of US cotton subsidies in 2002, and was eventually joined by a formidable list of third parties (Argentina; Australia; Benin; Canada; Chad; China; Chinese Taipei; European Communities; India; New Zealand; Pakistan; Paraguay; Venezuela; Japan; Thailand). Brazil alleged that US cotton subsidies are in contravention of WTO rules. Both the panel and the appellate body ruled in favour of Brazil.⁶⁰⁴ The US lost its final appeal against that ruling.⁶⁰⁵ Brazil now has DSB permission to take countermeasures against the US. It can suspend its obligations to the US under the TRIPs and the GATS, taking recourse to Article 22.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

This will enable Brazil to make generic copies of US patent medicines, and otherwise exploit US intellectual property. Brazil will be free also to deny the US access to its

⁶⁰¹ Weintraub, Sidney, 2000, *Development and Democracy in the Southern Cone*, Centre for Strategic and International Studies, Significant Issues Series, pp.40-41.

⁶⁰² Europa website, ‘Interregional Framework Cooperation Agreement between the European Community and Mercosur’, <http://europa.eu/scadplus/leg/en/lvb/r14013.htm>.

⁶⁰³ See section 2.1.6 of this thesis.

⁶⁰⁴ Ibid. WT/DS267/AB/R, 3 March 2005.

⁶⁰⁵ *United States – Subsidies on Upland Cotton*, note 41, Appellate Body Report, WT/DS267/AB/RW, 2 June 2008.

business, communication, construction, distribution, financial, tourism and transport services sectors, and to impose duties on US exports, having suspended its GATS obligations. This is arguably the biggest ever WTO victory against the US.

Pursuant to WTO rules, standard retaliation limits itself to the category of products that falls within the sector to which the subject of a dispute belongs.⁶⁰⁶ So when the dispute is to do with cotton-growers' national subsidies, then retaliation confines itself to sanctions against the offending country's agricultural products, where WTO agreements concerning them are in force. Cross-retaliation ventures into agreements that govern sectors other than the one to which the dispute belongs. WTO rules permit cross-retaliation when it is not 'practicable' or 'effective' to impose penalties only with regard to the breached agreement.⁶⁰⁷

A common observation since the Brazil-favouring ruling in *Uplands Cotton* is that threat of the suspension of the TRIPs provisions concerning IP protection might turn out to be the enforcement mechanism that developing countries can use against US non-compliance with DSB rulings. Arvind Subramanian was certainly persuasive when he proposed, almost ten years before the decision in *Upland Cotton*, that it might,⁶⁰⁸ as was Henning Grosse Ruse-Khan only a year before it.⁶⁰⁹ If Brazil proceeds to cross-retaliate, this developing country will create a 'first' in WTO history. As of June 2010, there has

⁶⁰⁶ Article 22(3)(a), Understanding on Rules and Procedures Governing the Settlement of Disputes.

⁶⁰⁷ Article 22(3)(b)-(c), Understanding on Rules and Procedures Governing the Settlement of Disputes.

⁶⁰⁸ Subramanian, Arvind, 'Can TRIPS serve as an enforcement device for developing countries in the WTO?', *Journal of International Economic Law*, 2000, pp. 405-406.

⁶⁰⁹ Ruse-Khan, Henning Grosse, 'A Pirate of the Caribbean? The Attractions of Suspending TRIPS Obligations', vol.11, no. 2, *Journal of International Economic Law* 2, 2008, pp. 341-342.

been no development regarding pharmaceutical patent suspension, but, according to Intellectual Property Watch, it is expected, although the Brazilian Chamber of Commerce ‘Brazil remains open to a dialogue with the United States that may facilitate the achievement of a mutually satisfactory solution to this dispute’.⁶¹⁰ One cannot but detect here a certain nervousness on Brazil’s part about suspending patent protection of US pharmaceutical products.

6.4.4 Bangladesh

While four LDCs (Bangladesh, Democratic Republic of Congo, Mozambique and Senegal) have undertaken national treatment obligations across some 130 sectors in investment treaties with the United States, their GATS schedules contain less than 20 sectors on average.⁶¹¹ This fact testifies that least-developed countries are far more concerned with concluding investment treaties than with liberalising their access-to-trade regimes. The obvious reason is that least-developed countries have little trades in services that anyone is interested in accessing, and that they lack the resources to access anyone else’s. Briefly, then, the GATS is of next to no present use for Bangladesh. Yet this country has proved itself litigation capable.⁶¹² This capacity will stand it in good stead as its economy and trade capacity develop.

⁶¹⁰ Intellectual Property Watch, ‘Brazil Issues US Retaliation List; Open To Talk’, 8 March 2010.

⁶¹¹ Adlung and Molinuevo, note 589, p.373.

⁶¹² *India–Anti-Dumping Measure on Batteries from Bangladesh*, DS306: ‘This is the first dispute involving an LDC Member as a principal party to a dispute. On 28 January 2004, Bangladesh requested consultations with India concerning a certain anti-dumping measure imposed by India on imports of lead acid batteries from Bangladesh ... On 20 February 2006, the parties informed the DSB of a mutually satisfactory solution to the matter raised by Bangladesh’, WTO, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds306_e.htm.

6.4.5 China

The Peoples' Republic of China (China) is in the complex position where its rapidly expanding economy and huge infrastructure-building programme require enormous amounts of energy. It must therefore stay 'on side' with energy suppliers, among both WTO Members and non-members. China has a massive manufacturing industry, and is in need of a concomitantly large international market. That, too, puts severe diplomatic constraints on this country. At the same time, its own huge population is attractive target of all major exporters, particularly for the US and EU audio-visual industry and banking sectors. Both these sectors seek greater market access than China is disposed to allow. China, therefore, comes in for concentrated attention, particularly by the US, by way of DSU action. Marcia Harpaz⁶¹³ gives a disturbing account of the extent of that attention:

China acceded to the WTO in 2001. 'By the end of 2009, eight cases had been brought against China, seven of which were filed in or after 2006.'⁶¹⁴ (Harpaz's footnote 84 remarks that '[t]his number counts complaints regarding the same subject but by different complainants as one case, even though the WTO Secretariat records them as separate disputes. At the beginning of 2010, the WTO site showed 17 cases against China.' In late 2010, that site shows 18 cases.)

⁶¹³ Harpaz, Marcia Don, 'Sense and Sensibilities of China and WTO Dispute Settlement', *Society of International Economic Law*, 21 June 2010.

⁶¹⁴ Ibid. p. 25.

Harpaz notes also that China's early tendency had been to settle with the complainant, often before a panel was formed. However, this changed after 2006, when China defended a complaint throughout the DSB process.⁶¹⁵ It launched its first independent complaint in September 2007, then 'four more complaints – one in 2008 and three in 2009'.⁶¹⁶ (By July 2010, China had become the independent complainant in seven cases.) Just as the overwhelming bulk of complaints against China is raised by the US and the EU, so China's complaints are levelled against these members. An interesting view here, to which Harpaz refers, is that '[s]ome scholars have warned that more frequent use of the WTO dispute settlement system by China and against China could "jam" the system'.⁶¹⁷

Whether or not the system can jam, is, however, less telling than the fact that late-accession countries to the WTO such as China bear the burden of WTO+ obligations imposed by their accession protocols. A landmark case⁶¹⁸ in which protocol obligations feature was recently decided in favour of the US and adopted by the DSB. The US Trade Representative filed two claim against China with the WTO DSB in April 2007. The first alleged China's lax enforcement of IP laws, the second⁶¹⁹ that China inappropriately restricts access to American IP products and services. Australia, the European Communities, Japan, Korea and Chinese Taipei joined this action as third parties.

⁶¹⁵ Ibid. p. 27.

⁶¹⁶ Ibid, p. 35 – 36.

⁶¹⁷ Ibid. pp. 4-5.

⁶¹⁸ *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, DS363, 10 April 2007.

⁶¹⁹ Ibid. WT/DS363/1GL/820 SL/287, 16 April 2007.

It is significant that the Appellate Body Report⁶²⁰ accepted that China ‘may, in this dispute, invoke Article XX(a) of the GATT 1994 to justify provisions found to be inconsistent with China's trading rights commitments under its Accession Protocol and Working Party Report’,⁶²¹ despite the fact that it upheld the Panel's conclusion that:

China has not demonstrated that the relevant provisions are ‘necessary’ to protect public morals, within the meaning of Article XX(a) of the GATT 1994 and that, as a result, China has not established that these provisions are justified under Article XX(a).⁶²²

Xiaohui Wu remarks that this is the first time that the Appellate Body ruled on the issue of whether a GATT Article XX defence is available outside the context of a claim under the GATT.⁶²³ The Appellate Body established also that this defence ‘can also be invoked to justify violations of non-GATT commitments, such as those set out in China’s Accession Protocol and Accession Working Party Report’.⁶²⁴

More significant still is that this Report is the first to rule on trading right obligations undertaken as Accession Protocol rather than exclusively in terms of WTO agreements.⁶²⁵ Admittedly, the AB Report does uphold the Panel’s finding that ‘the provisions of China's measures prohibiting foreign-invested entities from engaging in the

⁶²⁰ *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, Report of the Appellate Body, 21 December 2009.

⁶²¹ *Ibid.* para. 414(a).

⁶²² *Ibid.* para 415(e).

⁶²³ Wu, Xiaohui ‘Case Note: *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (WT/DS363/AB/R)’, vol. 9, no. 2, *Chinese Journal of International Law*, 2010, p. 427

⁶²⁴ *Ibid.* p. 428.

⁶²⁵ Wu, note 623, p. 428.

distribution of sound recordings in electronic form are inconsistent with Article XVII of the GATS'.⁶²⁶ However, it also twice upholds the Panel's finding on accession-regarding, GATS+ obligations:

... that Article 30 of the *Film Regulation* and Article 16 of the *Film Enterprise Rule* are inconsistent with China's trading rights commitments in paragraphs 1.2 and 5.1 of China's Accession Protocol and paragraphs 83(d) and 84(a) and (b) of China's Accession Working Party Report.⁶²⁷

and

Article 5 of the 2001 *Audiovisual Products Regulation* and Article 7 of the *Audiovisual Products Importation Rule* are inconsistent with China's obligation, in paragraph 1.2 of China's Accession Protocol and paragraph 84(b) of China's Accession Working Party Report, to grant in a non-discretionary manner the right to trade'.⁶²⁸

This move on the part of the Appellate Body is interesting because it establishes that WTO law can force China, not only on the basis of GATS Article XVII but also on GATS+ grounds (i.e. on its commitments in its Accession Protocol) to fully open up its financial services sector. Daniel Crosby's excellent scholarly analysis⁶²⁹ notes that foreign banks covet access to China's banking sector. That, however, is uncongenial to the Chinese government, which prefers to retain control of its banking sector. Although the Chinese criteria for authorising the supply of financial services are entirely prudential and impose no quantitative limits on licences, those prudential requirements used to impose location rules: Foreign financial establishments were initially able to operate only

⁶²⁶ *China – Measures Affecting Trading Rights and Distribution Services*, para. 416 (b).

⁶²⁷ *Ibid.* para. 414(c).

⁶²⁸ *Ibid.* para 414 (d).

⁶²⁹ Crosby, Daniel C, 'Banking on China's WTO Commitments: "Same Bed, Different Dreams" in China's Financial Services Sector', vol. 11, no. 1, *Journal of International Economic Law*, 2008, p. 76.

in specified cities. And licences were granted only to foreign banks and finance companies that had maintained a representative office in China for at least two years. Financial establishments had to demonstrate assets of at least US\$10 billion when they applied to establish a Chinese-foreign joint enterprise, and US\$20 billion when they applied to set up a branches. Branch licences were not granted to investment banks. China did relax these restrictions in 2006, in line with its GATS undertaking to do so, by removing the ‘location’ barrier and lowering its foreign-bank capitalisation requirements.⁶³⁰ Such relaxations, however, are rather less than the US and the EU wish to see. Their ‘ultimate goal’

... is ownership and control: foreign banks aim to manage their own business— independent from Chinese joint venture partners, free from the burden of NPLs and government influence, with qualified staff of their choosing, direct oversight of branches and payment infrastructures, direct access to established customer bases, and, of course, the full benefit of expected rewards.⁶³¹

Crosby notes also that:

The countries that have negotiated their accession to the WTO since 1 January 1995 have encountered Members’ high expectations for GATS commitments on financial services. No country has joined the WTO without making substantial commitments in most financial services sub-sectors, and China is no exception to this rule.⁶³²

⁶³⁰ Deloitte Touche, ‘China’s banking sector: Growing towards diversification’, p.4. http://www.deloitte.com/dtt/cda/doc/content/dtt_Boao_BankingEng041807.pdf.

⁶³¹ Crosby, note 629, p. 77.

⁶³² Ibid. p. 81.

He proceeds to explain that China's Accession Protocol and GATS Schedule ⁶³³ commit it to a full liberalisation of its financial sector that allows 'foreign access to its domestic banking services market over a five-year period culminating on 10 December 2006 with the full implementation of its accession commitments'. China is committed after this date to:

... allow foreign financial services institutions to supply banking services in accordance with the terms set out in its GATS schedule, which is incorporated by reference into the Protocol on the Accession of the People's Republic of China to the WTO. ⁶³⁴

Very significantly:

... China's GATS schedule does not include any national treatment limitations in the banking sector that remain in effect beyond 10 December 2006 (except for the global minimum asset requirements listed in the market access column). Therefore, China may not maintain or introduce discriminatory measures in scheduled banking sectors that modify the conditions of competition in favour of Chinese banks. ⁶³⁵

Crosby is clearly of the view that China is in no position (given GATS Article XVII and China's failure to limit national treatment in its GATS schedule, and China's Accession commitments) to avoid the full opening of its financial sector. He says that although 'no [WTO] Member has yet brought a case regarding trade in financial services', it is to be expected that, should one be brought, dispute settlement panels and the Appellate Body

⁶³³ WT/L/432 (23 November 2001), Part II, para 1 and Annex 9, incorporating China's GATS schedule, WT/MIN(01)/3/Add.2, 10 November 2001.

⁶³⁴ Crosby, note 629, p. 81.

⁶³⁵ Ibid. p.85.

‘will certainly reference existing WTO jurisprudence [that] provides guidance on the application of important GATS rules’.⁶³⁶

There is, however, indication that the Chinese Government is not inclined to agree. A Transitional Review Mechanism (TRM) was included in China’s Protocol of Accession. The TRM mandates the WTO General Council’s and its subsidiaries’ seeking, in each year for eight years, of information regarding China’s implementation of its WTO commitments. (The TRM was included in Section 18 of the Protocol, as requested by the US and supported by the EU. China considers it discriminatory, because it is applicable just to China.)⁶³⁷

During a TRM meeting of 27 November 2006, Crosby recounts,⁶³⁸ China responded to a concern, communicated to the WTO Committee on Trade in Financial Services by the US,⁶³⁹ that ‘it is widely understood that China currently maintains a policy limiting the equity share of a single foreign investor in a Chinese-foreign joint venture bank to 20 per cent, with the proviso that the equity share of the total foreign investment be lower than 25 per cent’. China responded that:

... the issue of foreign equity participation in China’s domestic banks was, by nature, an issue of cross-border merger and acquisitions (M&A), which was beyond the scope of China’s WTO commitments, and therefore irrelevant for the TRM.⁶⁴⁰

⁶³⁶ Ibid. p. 88.

⁶³⁷ Farah, Paolo and Cima, Elena, ‘China’s Participation in the World Trade Organization: Trade in Goods, Services, Intellectual Property Rights and Transparency Issues’, 25 December, 2009, <http://ssrn.com/abstract=1527992>.

⁶³⁸ Crosby, note 629, p. 87-89.

⁶³⁹ Communication by the United States to the WTO Committee on Trade in Financial Services, Questions from the United States to China concerning Financial Services, S/FIN/W/53 (18 October 2006) para 17.

⁶⁴⁰ Crosby, note 629, p. 90.

The present thesis writer has already mulled, in Chapter 3, on how far GATS can push sovereign states in a matter of national security. (Arguably, the control of the national financial sector is a matter of national security.) But it is important to return to this issue here, with this question: If the US can ‘get away with’ refusing to jeopardize national security by selling a port to the UAE,⁶⁴¹ how can the DSU respectably demand that China allow the purchase of its banks by foreign entities? Besides, what sort of global economic disaster would the DSB precipitate if it were to adopt a decision that it must allow this pursuant to the GATS national treatment principle? For in that event, China would surely fail to comply, and the US and EU would certainly retaliate. This would be disastrous for China’s economy, and, aggrieved, it would dump its dollar and sterling reserves ... Such possibilities are too horrible to contemplate. Right though Crosby obviously is in his view of how GATS and its Accession obligations bear upon China, it is unlikely that the DSB will let the GATS weight fall upon China, if only to preserve the WTO.

6.5 Conclusion

This Chapter proposed that, following the ruling in the *Uplands Cotton* case in favour of Brazil, the GATS has afforded cross-retaliation as a mechanism by means of which developing countries can enforce DSB rulings, provided that they can demonstrate to the DSB panel’s satisfaction, that cross-retaliation is the necessary remedy. It has proposed also that no benefit accrues to least-developed countries by way of the GATS; indeed, the Doha declaration that banned the taxation of goods delivered by e-commerce has deprived their economies of substantial taxation revenue, a taxation on which their economies depend far more than do those of developed countries. It was argued also that

⁶⁴¹ See section 3.3.1 of this thesis.

central GATS provisions – notably those that are: (i) silent on the distinction between what constitutes a ‘good’ and a ‘service’ and on the rectitude of the ‘national treatment’ obligation’s exclusion of the ‘free movement of labour’ possibility, and are (ii) as opaque as the ‘privacy of individuals’ concept that does not even make itself available as cause of action – cannot be universalised and are therefore incapable of functioning as international law. In another vein, this Chapter celebrated the success of the DSB Panel in the US Gambling case at clarifying the applicability of the ‘public morals’ principle, and the provision by the ruling in the Uplands Cotton case of a mechanism for developing countries to enforce DSB rulings against developed countries.. The Chapter concluded with the observation that ‘developing countries’ though they all be, the WTO experiences of the UAE, India, Brazil and China are so greatly different that nothing in their GATS compliance (or lack of compliance) accounts for the attention each gives and gets (or neither gives nor gets) as WTO complainant or defendant. The differences, it was proposed, are accounted for by the differences in their international relations and economy types. The Chapter noted with concern that the GATS has at least the theoretical capacity to enable the invasion by one Member state of another Member state’s tertiary industries to a point that might threaten the national security of the invaded state, and that financial-sector retaliation against a country (e.g. China) on GATS principles and with DSB permission would have a devastating effect on that country’s economy.

Having illustrated in Chapters 4 - 6 the failure of the major WTO Agreements to make development possible in member states most in need of development, Chapter 7 will

return to the discussion begun in Chapter 3 of the absence of distributive justice in the WTO system, and to the proposal that distributive justice is efficiently delivered when developing member states are absolved from WTO obligations. This Chapter will illustrate, in the context of a climate-change discussion, that that this is the optimal realisation of international distributive justice.

Chapter 7

Climate Change and Developing Countries:

International Distributive Justice in the MEAs - GATT/WTO Relationship

7.0 Introduction

This Chapter will identify the instances of GATT jurisprudence and WTO Agreements that are helpful in the relationship with multilateral environmental agreements (MEAs), and it will identify the factors that impede that relationship. Article 31(i) of the Doha Declaration is identified as the platform that lends itself to the forging of a sound relationship, part of which is the introduction into that relationship of the international distributive justice principle, which is proposed as the apt interpretation of the MEAs' 'common but differential responsibility' value. On that basis, the international distributive justice principle is recommended as the appropriate principle of a new climate law. GATT Article XX and its resistance to the disallowing of states' unilateral border tax adjustments (BTAs) is noted, and a means for ameliorating it is advanced. It is proposed that GATT Article XI(1) lends itself to the bringing of the carbon-credits market into WTO control. It is proposed also that a major problem in the relationship of the MEAs and the GATT/WTO, the GHG emitting and environment polluting behaviours of carbon-fuel extracting multinationals, has to be resolved by the United Nations Organisation (UN) legislation. Investor contracts that inhibit the climate-saving measures of host states should also be corrected by UN intervention.

7.1 The MEAs-GATT/WTO relationship and the international distributive justice principle that would construct it

Multilateral environmental agreements MEAs oblige the construction of a new climate law, for in the absence of one, there is no clear relationship between them and the GATT/WTO legislative scheme. Paragraph 31(i) of the Doha Declaration gives a *de facto* licence for its construction:

With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on:

(i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question.

The ‘specific trade obligations’ referred to here cannot but raise the fact that there is no ‘common but differentiated responsibility’ value in the GATT/WTO scheme, whereas that value has emerged in the MEAs as the normative value. Evidence of that is ubiquitous in MEAs. The following contexts are samples of it:

Principle 23 of the Stockholm Declaration:

... it will be essential in all cases to consider the systems of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries.⁶⁴²

Principle 7 of the Rio Declaration:

In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the

⁶⁴² Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) 16 June 1972.

global environment and of the technologies and financial resources they command.⁶⁴³

Articles 3(1) of the UNFCCC⁶⁴⁴:

The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities,⁶⁴⁵

and its Article 4(1):

All Parties, taking into account their common but differentiated responsibilities...⁶⁴⁶ (This is repeated verbatim in Article 10 of the Kyoto Protocol.⁶⁴⁷)

The efforts that produced the UNFCCC, and eventually the Kyoto Protocol, advanced a number of excellent propositions in the name of the ‘common but differentiated responsibility’ value. Nevertheless, this thesis writer proposes that the only ones of them that should become part of the new climate law are those consistent with the principle of international distributive justice. The nature of applied international distributive justice is illustrated in the following discussion of elements of the UNFCCC and the Kyoto Protocol.

The preamble to the UNFCCC promises unequivocally that international climate-change combating remedies will take ‘full account the legitimate priority needs of developing countries’:

Affirming that responses to climate change should be coordinated with social and economic development in an integrated manner with a view to avoiding adverse impacts on the latter, taking into full account the legitimate priority needs of

⁶⁴³ United Nations Conference on Environment and Development: The Rio Declaration on Environment and Development, 14 June 1992.

⁶⁴⁴ FCCC/INFORMAL/84, GE.05-62220 (E) 200705, <http://unfccc.int/resource/docs/convkp/conveng.pdf>.

⁶⁴⁵ United Nations Framework Convention on Climate Change, FCCC/INFORMAL/84, GE.05-62220 (E) 200705, 9 May 1992, <http://unfccc.int/resource/docs/convkp/conveng.pdf>.

⁶⁴⁶ Ibid.

⁶⁴⁷ The Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997.

developing countries for the achievement of sustained economic growth and the eradication of poverty ...⁶⁴⁸

This undertaking is consistent with the international distributive justice principle in that it envisages the distribution of obligations on a sliding-scale that is akin to their distribution on an objective criterion, such as GDP status. In this case, the criterion is ‘economic growth of developing/least-developed countries’.

Article 4(1) of the UNFCCC committed all parties to it to endeavour to reduce the impact of climate change, but Article 4(2) required only ‘developed country Parties and other Parties included in Annex I’ to implement specific

... national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs.⁶⁴⁹

This too, is a realisation of the international distributive justice principle, for it imposes obligations on the criterion of capacity, which again is akin to distribution on a sliding scale according to an objective criterion, which is the equivalent of distribution of obligations according to GDP status.

Article 3(1) of the Kyoto Protocol realises a perfect application of international distributive justice as advanced in 3.7.1 - 3.7.5 of this thesis. It does so by distributing the obligation to cap and reduce greenhouse gas emissions (GHG) such that only Annex 1 countries have an absolute obligation to do either:

⁶⁴⁸ Ibid. p.3.

⁶⁴⁹ Ibid. p.6.

The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012.

Article 4(3) committed developed countries to financing the developing countries' efforts to reduce their CO₂ emissions:

The developed country Parties and other developed Parties included in Annex I shall provide new and additional financial resources to meet the agreed full costs incurred by developing country Parties in complying with their obligations under Article 12, paragraph 1.⁶⁵⁰

Article 11(2) of the Kyoto Protocol⁶⁵¹ is also firm on the point that the climate-change-mitigating costs of developing countries will be borne by the developed countries:

In the context of the implementation of Article 4, paragraph 1, of the Convention, in accordance with the provisions of Article 4, paragraph 3, and Article 11 of the Convention, and through the entity or entities entrusted with the operation of the financial mechanism of the Convention, the developed country Parties and other developed Parties included in Annex II to the Convention shall:

(a) Provide new and additional financial resources to meet the agreed full costs incurred by developing country Parties in advancing the implementation of existing commitments under Article 4, paragraph 1 (a), of the Convention that are covered in Article 10, subparagraph (a); and

(b) Also provide such financial resources, including for the transfer of technology, needed by the developing country Parties to meet the agreed full incremental costs of advancing the implementation of existing commitments under Article 4, paragraph 1, of the Convention that are covered by Article 10 and that are agreed between a developing country Party and the international entity or entities referred to in Article 11 of the Convention, in accordance with that Article ...

⁶⁵⁰ Ibid. p.8.

⁶⁵¹ adopted in Kyoto on 11 December 1997 and entered into force on 16 February 2005. of the Parties of the Convention, 186 had ratified its Protocol. The detailed rules for the implementation of the Protocol were adopted at COP 7 in Marrakech in 2001, and are called the 'Marrakech Accords'.

This is not consistent with the principles of international distributive justice, because it envisages the redistribution of goods (finances, technology, etc.). International distributive justice distributes only obligations, not goods.

Notably, the UNFCCC and the Kyoto Protocol hold that developed countries are principally responsible for the current high levels of GHGs in the atmosphere because it is they that allowed the emission of those gases over more than 150 years of industrial activity. Both the UNFCCC and the Protocol place on them the burden of mitigating those emissions. They do so on the principle of ‘common but differentiated responsibilities’.⁶⁵² On this position, the denotation of ‘responsibility’ is retributive. That is, developed countries are being ‘made to pay’ for what ‘they’ have done. This is not even a justifiable attitude, let alone an expression of international distributive justice. The progeny of misfeasors cannot be required to bear responsibility for their ancestors’ misfeasance. Simon Caney is quite right on this point.⁶⁵³ No equity or criminal justice principle would support this position.

Although the transfer of environmentally sound technologies to developing countries is a treaty commitment of the signatories to the Kyoto Protocol pursuant to Articles 10(c) and 11(2)(b), developing countries are very aware that no such transfer has occurred. A study by Dechezleprêtre et al. confirms that:

⁶⁵² UNFCCC Web page, ‘Kyoto Protocol’, http://unfccc.int/kyoto_protocol/items/2830.php.

⁶⁵³ Caney, note 268, pp. 756-758.

The signature of the Kyoto Protocol does not seem to have had a significant impact on the international diffusion of climate mitigation technologies as compared to the overall trend in all sectors.⁶⁵⁴

Yet an obligation of developed countries to transfer technology to developing countries, albeit capable of promoting GHG emissions reduction worldwide, is not justifiable on the international distributive justice principle. Environmentally sound technologies are goods, or, in TRIPs terms, they are ‘intellectual property’. An obligation of some states to transfer them amounts to an obligation to redistribute goods. Redistribution should not be obligatory. It has to remain voluntary. All that can be done in the matter of technology transfer, in the name of international distributive justice, is to distribute the obligation to protect intellectual property along the ‘nil to absolute’ spectrum, such that non-Annex 1 countries have a ‘nil’ obligation to protect it.

However, there is a criterion available on the international distributive justice principle that justifies the bearing of the burden of climate-change mitigation by developed countries, and it is established on the objective criterion of the present-day GHG emission levels of countries: According to the World Bank, high-income countries emit CO₂ at 13 tonnes per year per capita, and middle and low-income countries no more than 3 tonnes for the same period. Also:

... developing countries like China, India and even Africa are expecting higher percentage drops in their CO₂ intensities than developed countries in future ... developing countries’ future CO₂ intensities would remain, as in the past, much smaller than that of most developed countries by 2030.⁶⁵⁵

⁶⁵⁴ Dechezleprêtre, Antoine, Glachant, Matthieu, Hascic, Ivan, Johnstone, Nick, Ménière, Yann, ‘Invention and Transfer of Climate Change Mitigation Technologies on a Global Scale: A Study Drawing on Patent Data’, 2009, pp. 17-18, <http://ssrn.com/abstract=1414227>.

⁶⁵⁵ Timilsina, Govinda R, ‘Atmospheric Stabilization of CO₂ Emissions: Near-term Reductions and Intensity-based Targets’, World Bank Policy Research Working Paper 4352, September 2007, p.17.

The available international distributive justice principle is that the greater burden of reducing emissions falls upon the grossest emitters, and graduates downwards to nil for the lesser emitters.

7.1.1 UNFCCC and Kyoto Protocol shortfalls in the application of international distributive justice

Overly and wrong-mindedly generous though both the UNFCCC and the Protocol sometimes are with ‘re-distribution of goods’ propositions, neither proposes the possibility of amending the GATT Article XX(b) and (g) rights to impose BTAs. This is not logical. If the Annex 1 countries are not to bear GHG emissions-reducing obligations, then they should not bear those obligations when they are imposed as GATT-compliant non-tariff measures such as the BTA. Article 3(5) of the UNFCCC touches upon this issue:

The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

But the UNFCCC did not reach a point where it might be seen to have begun to tamper with BTAs sanctioned by GATT Article XX(b) and (g), although it is clear in the above-quoted text that it foresees the possibility that BTAs might be imposed as ‘measures’ to ‘combat climate change’. It merely requires that those measures ‘should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade’. In so doing, it does nothing more than restate the GATT Article XX

chapeau provision that Article XX exemptions not be used to impose ‘a disguised restriction on international trade’.

The UNFCCC missed an opportunity here to introduce international distributive justice into the GATT/WTO scheme by declaring unequivocally that GATT Article XX measures may not be enforced against non-Annex 1 countries as BTAs that object to their products on the ground that those countries have not put GHG emissions-reducing strategies in place. That means that despite the UNFCCC’s provision that developing countries have no obligation to mitigate their GHG emissions, it has allowed that an obligation might be imposed on them in the GATT/WTO context.

Laura Nielsen makes a similar point in her discussion of the possible border carbon adjustments (BCAs) imposed unilaterally by ‘capped’ (Annex 1) countries to punish non-capped (non-Annex 1) countries that do not bind themselves in a post-Kyoto Agreement:

... whether it is decided in the Kyoto Protocol or the Post-Kyoto Agreement whether States under a cap can enact border carbon adjustments against parties not under a cap. This is currently not decided in the Kyoto Agreement.⁶⁵⁶

If indeed it is accepted in a UNFCCC context that Annex 1 countries can impose BTAs against non-Annex 1 countries on the grounds of their GHG emissions-reducing status, then the ‘common but differentiated responsibility’ value is in jeopardy, and it no longer gives effect to the international distributive justice principle on which only Annex 1 countries have GHG emission-reducing obligations.

⁶⁵⁶ Nielsen, Laura, ‘Trade and Climate Change’, vol. 7, issue 1, *Manchester Journal of International Economic Law*, 2010, p.11.

7.1.2 BTAs and international distributive justice

But then, can the UNFCCC have done anything on the international distributive justice principle to exempt non-Annex 1 countries from Annex 1 countries' unilateral imposition of BTAs that impose climate-change regarding obligations on them? The GATT Article XX licences that permit the imposition of BTAs are:

the sub-section (b) measures

necessary to protect human, animal or plant life or health;

the sub-section (d) measures

necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

and the sub-section (g) measures

relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

A cursory way of dealing with this would be to declare that once non-Annex 1 countries are absolved by the new climate law of GHG emissions-reducing obligations, Article XX-based BTAs cannot be imposed on them on the grounds of their GHG emissions. Yet there is a serious awkwardness here. The 'no obligations' declaration might readily dispose of the GATT Article XX (d)-facilitated BTA, on the ground that (d) entitles a BTA that enforces a law, not one that works against a law such as the new climate law.

BTAs licensed by subsections (b) and (g), however, cannot be dismissed on that ground, for those subsections bear upon the sovereign state's right to protect human and animal

life and health and exhaustible natural resources. The present writer is aware that the literature does not view GATT Article XX(b) and (g) as the protector of sovereign rights, that the GATT does not explicitly characterise it as such, and that DSB jurisprudence also does not take that view explicitly. But I propose nevertheless that the divergence that Condon observes⁶⁵⁷ in that jurisprudence can be accounted for by the view that there is a tacit DSB reluctance to disallow BTAs based on XX(b) and (g), so long as they are within the parameters of the chapeau. Condon argues that in *US Gasoline*,⁶⁵⁸ a case ‘involving paragraph (g) ... the Appellate Body found that a failure to negotiate led to a failure to comply with the non-discrimination requirements of the chapeau’.⁶⁵⁹ In *US Shrimps–Turtles*,⁶⁶⁰ however, ‘it was unclear whether the obligation to negotiate’ stemmed not from paragraph (g) but from other factors, among them ‘multilateral environmental documents’. Then he proceeds to argue that ‘in cases involving paragraph (b)’ – and he cites only one such case: *EU Asbestos*⁶⁶¹ – ‘the Appellate Body has not found any obligation to negotiate’. He concludes on this basis, and citing ‘the rules of effective treaty interpretation’,⁶⁶² that the divergence in jurisprudence here is attributable to the fact that paragraphs (b) and (g) must apply to different matters.

The ‘different matters’ point is sound, but that the divergence in jurisprudence is attributable to the different matters that (b) and (g) contemplate is less so, for it is

⁶⁵⁷ Condon, Bradley J, ‘Climate Change and Unresolved Issues in WTO Law’, *Journal of International Economic Law*, advance access copy published on 24 September 2009, http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=bradly_condon.

⁶⁵⁸ *United States - Standards for Reformulated and Conventional Gasoline*, (Appellate Body) WT/DS2/AB/R, 29 April 1996.

⁶⁵⁹ Condon, note 657, p. 31.

⁶⁶⁰ note 294.

⁶⁶¹ *European Communities-Measures Affecting Asbestos and Asbestos Containing Products* (Panel) 2000, WT/DS135/R.

⁶⁶² Condon, note 657, p. 32.

attributable also to the DSB's inclination to engage some criteria, for instance, the presence of negotiation, when it will serve the interest of preserving a chapeau-compliant BTA against a challenger, and when the DSB feels an obligation to take account of MEAs. This is inferable from the fact that there is no DSB case that overturned a BTA on the basis of the absence of negotiation. This is as expected, since the chapeau does not oblige negotiation. But it 'looks good' when the DSB contemplates the 'negotiation' requirement of MEAs.

The provisions of Article XX(b) and (g), inasmuch as they defend the sovereign right of states to put into practice, *inter alia*, their views, including their moral views, on what is appropriate protection of the environment, limit the scope of an international climate law. Whether this power to limit is itself moral must be decided on whether it is national sovereignty in the matter of environment protection that overrides the importance of non-Annex 1 countries' free market access, or *vice versa*. Rival moral positions cannot be arbitrated on a distributive justice principle.

A question does, however, arise validly about whether the state is entitled to protect only its own citizens' and animals' life and health, and its own exhaustible natural resources, or does GATT Article XX(b) and (g) empower it to protect those things beyond its borders? For instance, can a state, on the strength of (b), impose a BTA against, say, products in India that are manufactured by child labour, on the ground that that is a process and production method (PPM) that is destructive of children's life and health? Or might a state impose a BTA on the strength of both (b) and (g) against, say, Israeli

agricultural products because their cultivation makes unfair use of scarce water resources in the area and deprives Palestinians of adequate drinking water?

DSB jurisprudence has indicated that BTAs licensed by GATT Article XX(b) and (g) do not have to be only ‘own state’ protecting ones: The *US–Shrimp Turtles* case considered a US ban on the importation of shrimps from countries that harvest them with nets not equipped to exclude sea turtles, an endangered species. India, Pakistan, Malaysia and Thailand challenged the US measure. The DSB Appellate Body found that the US law fell within the scope of the Article XX(g) exemption for measures relating to the conservation of an exhaustible natural resource. Indeed, in the light of the Appellate Body’s interpretation, in *EU–Asbestos*, of ‘related to’ as meaning that there is a demonstrable means-to-an-end relationship between the trade measure and the conservation purpose, it is likely that not even jurisdictional proximity is of much consequence for the BTA that relies on the Article XX(g) exemption.

These decisions makes it seem that a state’s moral denunciation of other states’ PPMs is available on GATT Article (b) and (g). That is, the Article XX exemptions, within the limits of its chapeau, absolve member states from the Article I most favoured nation (MFN) and the Article III national treatment (NT) rules when the issue is grounded on certain moral stands on the appropriate protection of human and animal life and health and the environment. Condon, however, makes this point:

GATT Article 1 requires that like products be granted unconditional market access, which may imply that non-discriminatory access to the importing nation’s

market can not be made conditional upon the exporting country's environmental policies.⁶⁶³

Unfortunately, he does not develop this point, so it does not become clear why a country's environmental policies might not be an allowed factor in the limiting, by non-tariff measures such as the BTA, of that country's products' market access. If environmental policies were disallowed in that context, then a notice to that effect would be contained in the GATT Article XX chapeau. (An argument to the effect that the expression 'environmental policies' and its variations was not abroad in 1947 when the GATT came into effect would not be persuasive, for GATT 1994 would have amended the Article XX chapeau if the intention of Article 1 were indeed to disallow the limiting, by a non-tariff means, of market access on ground of a country's environmental policies.)

GATT Article XX(b) and (g) are all but immovable by the new climate law, for there is no DSB jurisprudence to support its displacement, and Technical Barriers to Trade (TBT Agreement) supports it fulsomely. There is a discernible overlap between its provisions and the TBT Agreement in that the latter seeks no more of BTAs than to ensure that technical regulations are not 'more trade restrictive than necessary to fulfil a legitimate objective',⁶⁶⁴ and do not discriminate between 'like products'.⁶⁶⁵ The TBT Agreement is unlikely to disallow the imposition of a BTA that Article XX (b) and (g) licenses, even if it is a BTA that discriminates against a product produced in a carbon-intensive process for reason alone that it was so produced. In the *EU-Asbestos* case the Appellate Body did require the challenger to prove that its more carcinogenic product is indeed 'like' the

⁶⁶³ Condon, note 657, p. 21.

⁶⁶⁴ Article 2(2).

⁶⁶⁵ Article 2(1).

respondent's less carcinogenic product. That reversal of the burden of proof is a TBT Agreement facility. But in *Brazil–Retreaded Tyres*,⁶⁶⁶ the Panel noted that it may be necessary to demonstrate only that a measure is 'likely' to achieve a desired health objective to prove that it is a 'necessary' measure. This seems to be a considerable softening of the Panel's view in United States Section 337 of the Tariff Act⁶⁶⁷ that 'when necessary' is strictly interpreted to mean that necessity obliges it because less restrictive trade measures are not available.

GATT Article XX(b) and (g) therefore impose an *a priori* limitation on the scope of the international distributive justice principle in the new climate law. Where that principle distributes a 'nil' obligation to non-Annex 1 countries in the matter of reducing GHG emissions, it might have to recognise the lawfulness of the indirect imposition of them by GATT Article XX(b) and (g) BTAs. This conclusion is impossible to avoid, because the right of the sovereign state to impose its own environment and health safety measures is firmly entrenched in the GATT/WTO legal scheme. 'Environment' is referenced in no fewer than five WTO Agreements, none of which challenge the GATT Article XX(b) and (g) licence to impose BTAs: Paragraph 12, Annex 2 of the Agreement on Agriculture (AoA); Paragraph 2, Article 5 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS); Articles 2 and 5 of the Agreement on Technical Barriers to Trade (TBT); Article 27.2 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); Article XIV (b) of the General Agreement on Trade in Services (GATS).

⁶⁶⁶ *Brazil–Measures Affecting Imports of Retreaded Tyres* (Panel) WT/DS332/R, 12 June 2007.

⁶⁶⁷ GATT Panel Report, *United States Section 337 of the Tariff Act of 1930*, L/6439, adopted 7 November 1989, BISD 36S/345.

Furthermore, paragraph 6 of the Doha Declaration affirms the right of WTO member states to impose their own environmental standards:

We recognize that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements.

The best the new climate law can do to rescue the ‘common but differentiated responsibility value’, that is, the operation in it of the international distributive justice principle that keeps alive the UNFCCC/Kyoto Protocol position that non-Annex 1 countries have no emissions-reducing obligations, is to construct a provision that forbids the imposition of BTAs pursuant to GATT Article XX(b) and (g) that are not purely environment and human or animal life-and-health regarding in the jurisdictions that impose them. That would be to ‘bite the bullet’ in the matter of withdrawing states’ rights to denounce the health destroying, human-and-animal-life destroying and environment destroying PPMs of other states. Whether Annex 1 countries are prepared to cede their sovereignty on this point is, of course, a critical issue, and whether it is morally desirable that they do – in the interest of the economic development *via* market access of non-Annex 1 countries – is another. In favour of the latter is the view that ideally, trade is amoral and apolitical. As such, it does not trespass upon state sovereignty. So divesting GATT Article XX(b) and (g) of the power that allows states to trespass upon the sovereignty of other states is to improve international trade.

7.2 The MFN and NT rules as both climate-law friendly and unfriendly

GATT Articles I and III, supported by the Agreement on Subsidies and Countervailing Measures (SCM Agreement), together frustrate the climate-change mitigating strategy commonly known as the prevention of carbon leakage. ‘Carbon leakage’ occurs when the taxation of the GHG emissions of installations in Annex 1 countries is so onerous that those installations relocate to non-Annex 1 countries that do not have emission-reduction commitments, and can therefore afford to impose either no taxes, or much less onerous taxes, on those installations. In this situation, there is no global reduction of GHG emissions, but merely the relocation of the emitting installation. The Intergovernmental Panel on Climate Change (IPCC) defines carbon leakage thus:

Carbon leakage is defined as the increase in CO₂ emissions outside the countries taking domestic mitigation action divided by the reduction in the emissions of these countries. It has been demonstrated that an increase in local fossil fuel prices resulting, for example, from mitigation policies may lead to the re-allocation of production to regions with less stringent mitigation rules (or with no rules at all), leading to higher emissions in those regions and therefore to carbon leakage.⁶⁶⁸

Under Article I of the SCM Agreement, domestic subsidies can be challenged by WTO members if exports produced with the aid of state subsidies cause ‘serious prejudice’, or ‘nullify or impair’ another member country’s domestic industry. Therefore the EU practice (under the EU Emissions Trading Directive⁶⁶⁹) of allocating up to 100 percent of

⁶⁶⁸ IPCC, 2007, *Climate Change 2007: Mitigation of Climate Change*, ‘Mitigation from a cross-sectoral perspective: Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change’, Metz, B, Davidson, OR, Bosch, PR, Dave, R and Meyer, LA (eds), Cambridge University Press, para. 11.7.2.

⁶⁶⁹ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.

the total carbon allowances free of charge⁶⁷⁰ to the covered installations is open to challenge under the SCM Agreement, according, to Zeller⁶⁷¹ and others, for being a form of tariff protection.

It has to be conceded that Zeller's is a valid point. It will be shown below that the EU's rule against anti-competitive state subsidy (an MFT/NT analogue) can work well against the collusion of political power and a multinational at the expense of state revenue. But it was important to show first that it can work also to disable a state's effort to provide against carbon leakage. That it can do this is unfortunate, for forestalling the 'carbon leakage' that would occur upon an installation's relocation to a non-Annex 1 country is a worthy activity. Nothing is done in the interest of repairing damage done by GHG emissions if an emitter relocates to a non-Annex 1 state to avoid meeting its emissions-reducing target. The new climate-change law should seek the exempting of carbon credits from the SCM Agreement's tariff-protection category of behaviours. The task will not be an easy one, for that law will have to be drafted to make it impossible to distribute carbon credits with a tariff-protection purpose that are disguised as prevention of carbon leakage measures.

The SCM Agreement contains a series of determinations about when a state subsidy affects international competition or otherwise distorts trade. Pursuant to this Agreement, there are three classes of government subsidy: prohibited, actionable and non-actionable.

⁶⁷⁰ The EU ETS provides thus at Article 10: 'For the three-year period beginning 1 January 2005 Member States shall allocate at least 95 % of the allowances free of charge. For the five-year period beginning 1 January 2008, Member States shall allocate at least 90 % of the allowances free of charge.'

⁶⁷¹ Zeller, Bruno, 'Systems of Carbon Trading', vol. 25, *Touro Law Review*, 2009, p. 917.

Subsidies directly connected to export activity, or directly supporting domestic goods against imported ones, are prohibited. Governments can be required to remove prohibited subsidies. Actionable (through the DSB) subsidies are those that cause economic injury to foreign producers in competition with domestic producers, or adversely affect the world price of a good. Permission to impose countervailing measures against a member state that has actionable subsidies in place are available through the DSB.

It is possible that a case can be made to the effect that climate-regarding government subsidies are non-actionable subsidies. This is important with regard to carbon leakage prevention by way of cost-free government allocation of emission allowances to industrial installations and power producers. Like Zeller, Hufbauer et al⁶⁷² have also posited that these allocations might constitute an actionable subsidy. Efforts should be made, in the construction of a climate-change law, to activate the SCM Agreement's non-actionable subsidy provision in a way that exempts government subsidies (by way of free carbon credits) that serve the purpose of preventing carbon leakage. It should also be kept in mind that the carbon credits issue is far less damaging than the carbon market, so attention should concentrate on the latter.

7.3 The counter-productive carbon-credits market problem

The Kyoto credits have inadvertently encouraged a financial industry of which the purpose is to enable investors in it to avoid making GHG emissions reductions by

⁶⁷² Hufbauer, GC, Charnovitz, S and Kim, J, 2009, *Global Warming and the World Trading System*, Peterson Institute, pp. 60-64.

purchasing carbon credits. This new arm of the financial sector became apparent as early as 2002:

Rothschild Australia and E3 International are set to become key players in the international carbon credit trading market, an emerging commodity market that analysts estimate could be worth up to US\$150 billion by 2012. In a move that will re-shape the fledgling emissions trading market, Rothschild Australia and E3 International today announced their intention to launch the Carbon Ring Consortium – an investment vehicle that will provide companies in the Asia Pacific Region with an innovative way of learning about and understanding their risks in the new carbon market ... Richard Martin, the chief executive officer of Rothschild Australia said, ‘With recent developments in international climate change policy, the question is no longer if, but when the global carbon trading market will emerge. Rothschild Australia, through Carbon Ring, intends to be at the forefront of this market, providing private investment vehicles to companies seeking to offset their greenhouse gas emissions liabilities ... *The Consortium should appeal to companies that are faced with a greenhouse liability and are significant users or producers of energy, such as electricity generators, heavy industrials, oil companies, major manufacturers or airlines, amongst many others* [italics added].⁶⁷³

The italicised text of the above statement makes known quite unequivocally that the worst emitters of GHGs, the ‘producers of energy, such as electricity generators, heavy industrials, oil companies, major manufacturers or airlines’, will be the very industries enabled by International Emissions Trading (IET), otherwise known as the ‘carbon market’, to avoid the need to reduce those emissions. Evidence that the emission-reductions avoiders are many, well financed and keen on supporting the carbon market exists in the size of that market:

The continued spectacular growth of the carbon markets shows no sign of holding back. From €22bn in 2006, to €40bn in 2007 and to an estimated €100bn in 2008.

⁶⁷³ PR Newswire on behalf of N M Rothschild and Sons, ‘Rothschild Australia and E3 International to take the lead in the global carbon trading market’, <http://www.prnewswire.co.uk/cgi/news/release?id=90090>; Reuters, ‘Rothschild, E3 launch carbon credit investment fund’ 3 September 2002. http://www.911omissionreport.com/rothschild_carbon_credit.html.

By some estimates, that figure could rise to €550bn by 2012 and, with the inclusion of the US, €3tr in 2020.⁶⁷⁴

The supplier of the above figures notes also that at the same time:

... man-made carbon emissions are still going up; in the 1990s by 0.8 per cent per year, rising to 3.1 per cent from 2000 to 2006. In other words, a nearly 40 per cent increase from 6.2bn tonnes in 1990 to 8.5bn tonnes in 2007.⁶⁷⁵

7.3.1 The EU ETS

The inspiration of the International Emissions Trading (IET), or ‘carbon market’, was the introduction into the Kyoto Protocol of emissions trading as a ‘flexible mechanisms’.

Emissions trading, as set out in Article 17 of the Kyoto Protocol, allows countries that have emission units to spare – emissions permitted them but not ‘used’ – to sell this excess capacity to countries that are over their emissions targets. Before this mechanism was introduced, there were only two flexible mechanisms, both of them project-based: (i) the clean development mechanism (CDM), and (ii) joint implementation (JI) enables.

Article 6 of the Kyoto Protocol outlines the JI, and Article 12 the CDM. JI enables industrialized countries to carry out joint implementation projects with other developed countries, while the CDM involves investment in sustainable development projects that reduce emissions in developing countries.

The JI was designed to help Annex 1 countries meet their emission-reduction obligations through joint projects with other Annex 1 countries. Investors (the government, companies, etc.) in one Annex 1 country undertake to participate in an emissions-

⁶⁷⁴ Lewis, Dan, ‘The great carbon credit swindle’, The Institution of Engineering and Technology, 20 January 2009, <http://kn.theiet.org/magazine/issues/0901/carbon-swindle-0901.cfm>.

⁶⁷⁵ Ibid.

reduction project in another Annex 1 country. This earns emission-reduction units (ERUs) from the host country, which can then be transferred to the investor country and added to its total allowable emissions.

The CDM allows an Annex I country with an emission-reduction or emission-limitation commitment under the Kyoto Protocol to implement an emission-reduction project in developing countries. Such projects can earn saleable certified emission reduction (CER) credits, each equivalent to one tonne of CO₂, which can be counted towards meeting the implementing country's Kyoto targets.

To earn credits under the CDM, the project proponent must prove and have verified that the GHG-emissions reductions are real, measurable and additional to what would have occurred in the absence of the project. One of the prime interests of developing countries in the CDM is its potential to facilitate the transfer of clean technologies. The UNFCCC anticipates that by 2012, China will have issued 45 percent of all CERs.⁶⁷⁶

The severe problem with the flexible mechanisms is that it is carbon-credits trading, and not JI and CDM, that dominates the carbon market. That the European Union Greenhouse Gas Emission Trading System (EU ETS) has enabled emissions trading accounts in large part for its weaknesses.

Article 1 of the EU ETS provides thus:

⁶⁷⁶ UNFCCC, *Clean Development Mechanism*, Executive Board Annual Report 2009, Figure 5, http://unfccc.int/resource/docs/publications/cdm_annual_report_2009.pdf.

This Directive establishes a scheme for greenhouse gas emission allowance trading within the Community (hereinafter referred to as the ‘Community scheme’) in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner.

The primary purpose of the allocation of Kyoto credits is the economically efficient promotion of GHG-emissions reduction. And in this the EU ETS has failed demonstrably, according to several commentators. Robinson and O’Brien⁶⁷⁷ remark that during the first phase of the EU ETS (2005-2007):

Huge over-allocation of permits to pollute led to a collapse in the price of carbon from €33 to just €0.2 per tonne, meaning that the system did not reduce emissions at all.⁶⁷⁸

Concurring with these commentators, Skjærseth and Wettstad observe that the national allocation plans (NAPs) – Robinson’s and O’Brien’s ‘permits to pollute’ – of the first EU ETS phase, distributed to installations as member states saw fit, nourished an allowances-trading market, and to boot, one in which the level of uncertainty was high:

...a steep price drop of allowances (the carbon price) in the pilot phase – from a top level of around £30 per tonne CO₂ in late April 2006 down to around £12 in early May and further down in the spring of 2007, hitting a low of only £0.5 in the end of April 2007.⁶⁷⁹

The aim of the EU ETS, obviously, is to provide installations with a less economically onerous means of meeting their emission-reducing targets, not to give rise to a volatile allowances-trading industry. The Commission therefore intervened in NAPs

⁶⁷⁷ Robinson, Hugo and O’Brien, Neil, ‘Europe’s dirty secret: Why the EU Emissions Trading Scheme isn’t working’, August 2007, *Open Europe*, pp. 2-54, <http://www.openeurope.org.uk/research/etsp2.pdf>.

⁶⁷⁸ Ibid. p. 5.

⁶⁷⁹ Skjærseth, Jon Birger and Wettstad, Jørgen, ‘The Origin, Evolution and Consequences of the EU Emissions Trading System’, vol. 9, no. 2, *Global Environmental Politics*, May 2009, p.114.

arrangements for the second phase (2008-2012) of the EU ETS. A new Directive⁶⁸⁰ obliged member states to develop NAPs for every five-year period, state the quantity of allowances they mean to allocate, and the purposes of the allocations. States were obliged also to outline their allocations criteria, guided by the criteria listed in the Directive, publish the NAPs thus constructed, notify the Commission and the member states of it, and take due account of responses to it from the public. The Commission reserved the right to reject a NAP that is not consistent with the Directive's criteria.

However, this Directive did not survive the first challenge to its decision based on it. In 2006, Poland and Estonia notified the Commission of their 2008-2012 NAPs. The Commission rejected them for being incompatible with the Directive's criteria, and decided that their annual quantities of emission allowances should be reduced, respectively to 26.7 percent and 47.8 percent. Poland (supported by Hungary, Lithuania and Slovakia) and Estonia (supported by Lithuania and Slovakia) brought actions for the annulment of the Commission's decisions. (The Commission was supported by the UK.) The European Court of First Instance (Court) annulled the Commission's decision, deeming that the Commission had exceeded its powers, and infringed the duty to state reasons on the principle of sound administration.⁶⁸¹

The Court's decision that the Commission had exceeded its powers might well be fatal for the Commission's plans to constrain member states' NAPs such that they are 'supplemental to domestic action and domestic action will thus constitute a significant

⁶⁸⁰ Directive 2003/87/EC, note 669.

⁶⁸¹ Curia Europa, Press Release No. 76/09, Judgments of the Court of First Instance in Case T-183/07 and in Case T-263/07, *Poland v Commission* and *Estonia v Commission*, 23 September 2009, <http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-09/cp090076en.pdf>.

element of the effort made'.⁶⁸² That is, the Commission meant to ensure that NAPs alone would not be the satisfiers of emission-reduction targets; actual emission reductions would also have to occur. Since the Court's decision against it, the Commission is without what might have been a strategy to break the credits-accumulating culture that had established itself in EU ETS to evade actual emissions-reducing action.

The Commission's Linking Directive⁶⁸³ enabled EU states to allow their operators to use carbon credits derived from the Kyoto Protocol mechanisms to meet their compliance targets under the EU ETS. Robinson and O'Brien claim that because the Linking Directive left member states free to decide the cap they would set on their Kyoto credits (CERs and ERUs) and imports, member states have imported about 1.3bn tonnes worth of Kyoto credits with which to meet their emission-reduction targets, which is more than the World Bank estimates as their emissions-reducing burden. All member states, except the UK, Spain, Finland and Italy, can now meet their reduction targets entirely on Kyoto credits.⁶⁸⁴ This, these commentators conclude, means that 'it is likely that a majority (if not all) of the "reductions" which are being made as a result of the system will take place outside the EU'.⁶⁸⁵ In short, the Kyoto credits make it unnecessary to make emission-reduction efforts in EU countries. Robinson and O'Brien derive this point from WWF-UK:

WWF has assessed 9 of the plans (Germany, UK, Poland, Ireland, France, Spain, Netherlands Portugal and Italy) and estimates that between 88% and all of the

⁶⁸² Article 19, Directive 2003/87/EC, note 581.

⁶⁸³ Directive 2004/101/EC of the European Parliament and of the Council of 27 October 2004 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in respect of the Kyoto Protocol's project mechanisms text with EEA relevance.

⁶⁸⁴ Robinson and O'Brien, note 677, p.6.

⁶⁸⁵ Ibid.

emissions reductions required under the combined cap for these countries could theoretically take place outside the EU. This could have serious consequences for investment decisions made within the EU by heavy industry - including the power sector – potentially leading to a ‘lock in’ to high carbon investments and soaring emissions from these sectors for many years to come. This would fatally undermine EU emission reduction targets for 2020 and 2030.⁶⁸⁶

Why the linking of EU allowances and Kyoto credits was thought a good idea is usually explained thus:

Credits from CDM and JI projects have been historically cheaper than EU allowances, so allowing them into the EU ETS may make it less expensive for participating companies to meet their targets than it would otherwise have been.⁶⁸⁷

But how, having bought those cheap Kyoto credits, are ‘participating companies’ meeting their targets? That is, what have they done, other than accumulate credits, to meet them?

The unavoidable answer is ‘nothing’, if that is what they wanted to do, for they have bought their licences (carbon credits) to keep their emission levels as they are. And do the vendors of Kyoto credits do more than accept the price of them? Well, not necessarily; if they are non-Annex 1 countries, they have not had to commit to emission-reduction targets. A study by David Victor, a carbon trading analyst at Stanford University, has revealed that two-thirds of the supposed emission reduction credits earned on the CDM system saw no actual reduction of CO₂ emissions anywhere.⁶⁸⁸ One must then wonder why all this carbon-credits trading is going on, if it is apparently not driving GHG-emission reduction. Clearly, the essential measure of the success of the EU ETS, and of course of the Kyoto emissions trading mechanisms, is whether emission-reducing activity

⁶⁸⁶ WWF-UK, ‘Emission Impossible: access to JI/CDM credits in phase II of the EU Emissions Trading Scheme’, p.3, http://assets.panda.org/downloads/emission_impossible__final_.pdf.

⁶⁸⁷ Department for Business & Innovative Skills, ‘The EU Emission Trading Scheme’, <http://www.berr.gov.uk/whatwedo/sectors/ccpo/EUemissionstrading/page20668.html>.

⁶⁸⁸ Victor, David, ‘Life After Kyoto’, Lecture delivered to the Burkle Centre for International Relations, UCLA International Institute, 4 March 2008.

is happening according to the target pledges of the signatures to the Protocol. Just as clearly, those mechanisms are condemned on that measure.

The trade as it exists is directed by investors, given that CERs and ERUs and are now traded internationally along with all manner of IETs. One investor, the Shell Oil Company, freely admits this:

In the EU ETS and CDM/JI markets, the main products we buy and sell are EU Allowances (EUAs), Certified Emission Reductions (CERs) and Emission Reduction Units (ERUs). Additionally, we also trade UK Allowances (UKAs), RECs, GoOs, ROCs, AAUs and eventually EU Aviation Allowances, New Zealand Units, Australian Emissions Units and others.⁶⁸⁹

One can attribute the fact that CERs and ERUs are not working to bring about GHG emissions reductions to their consumption by international carbon-market traders and investors. That is not the purpose for which the Kyoto Protocol intended them. The solution is to incapacitate the international carbon market. The new climate law can easily do this on the basis of GATT Article XI(1).

GATT Article XI(1) prohibits the maintenance of quantitative restriction measures, whether they be maintained as ‘quotas, import or export licences or other measures’. But it allows them to be maintained as ‘duties, taxes or other charges’. Furthermore, no WTO agreement prohibits export taxes. And *United States—Measures Treating Export*

⁶⁸⁹ Shell Company, FAQs, ‘Frequently Asked Questions about Environmental Trading Markets’, December 2009, http://www.shell.com/home/content/shipping_trading/environmental_trading_solutions/resource_centre/faq/.

*Restraints as Subsidies*⁶⁹⁰ confirmed that export taxes cannot be a state subsidy in the meaning of the SCM Agreement.

The obligation to eliminate specific export taxes has been imposed, as parts of their accession commitments, on countries acceding to WTO membership by existing members. Under the Dispute Settlement Understanding (DSU), such ‘WTO-plus’ commitments are considered enforceable like any other WTO commitment. This was established unequivocally in *China–Auto Parts*.⁶⁹¹ But no country has yet thought to impose a tax on the export of carbon credits. So no country can have made a WTO-accession commitment to abandon it. Nothing, therefore, inhibits an international trade law that makes their taxation obligatory upon member states.

The new climate law should require that all WTO member states impose an export tax on all carbon credits. The tax should be sufficiently heavy to make them unattractive commodities to traders. That will have two desirable outcomes: the international carbon market will peter out, and carbon credits will stay in the country to which they were issued, their only remaining use the one intended for them: GHG emissions reduction in that country.

The carbon-credits market is a major problem in the GHG emissions reduction effort. It can, fortunately, be resolved in the GATT/WTO context on the authority of GATT Article XI(1). Some equally big problems cannot.

⁶⁹⁰ (Panel Report) WT/DS/194/R, 29 June 2001, para. 8.75-76.

⁶⁹¹ *China–Measures Affecting Imports of Automobile Parts*, (Panel Report) WT/DS/339-340-342/R, 18 July 2008, para. 7.740.

7.4 The carbon-fuel extractor problem

It is a ‘fact of life’ that developing states without the means of extracting their own carbon-fuel materials are reliant on investors. In some cases, this results in the state’s selling all stakes in its own oil industry to investors. The developing state, and some of the ones classified by the UNFCCC as an Annex 1/Annex B state, are often not in a strong bargaining position, so they are not well placed to demand environment-protecting guarantees from the investor. Exacerbating this is the likelihood of the developing state’s representatives’ preparedness, for personal monetary gain, to conclude investment contracts in the investor’s favour. One dire outcome of this is that the state’s representatives enable the investor to take the state’s entire oil reserves into its private ownership, incorporate itself as a company in that state, and extract uniquely favourable taxation terms from that state. This appears to have been the case with regard to the energy company incorporated in Hungary, Hungarian Oil & Gas Plc, or *Magyar Olaj- és Gázipari Nyrt* (MOL).

The MOL case is of interest because Hungary is presently being investigated by the EU Commission for breaching the EU’s competition rules by providing MOL with state aid:

The alleged State aid measure is the 2005 agreement (‘the agreement’ or ‘the contract’) between MOL and the Hungarian State which allows the company to be actually exempted from the increased level of mining fee following an amendment to the Hungarian Mining Act in January 2008.⁶⁹²

The EU Commission describes MOL as:

⁶⁹² *State aid – Hungary – Alleged aid to MOL*, C1/2009, (ex NN 69/2008, European Commission, Brussels, C (2008)), 13.01.2009, paragraph 2, page 1, http://ec.europa.eu/competition/state_aid/register/ii/doc/C-1-2009-WLWL-en-13.01.2009.pdf.

... an integrated oil and gas company listed at the Budapest, Luxembourg and Warsaw Stock Exchanges ... the MOL group also comprises several Hungarian and foreign Subsidiaries ... *[such] as one of the leading Hungarian chemical companies TVK, the Slovakian oil company Slovnaft, the Austrian retail and wholesale company Roth. It is also engaged in a strategic partnership with the Croatian company, INA* (footnote 3).⁶⁹³

It is relevantly added that MOL, according to its own disclosure of its structure of ownership, is wholly privately owned.⁶⁹⁴

Of further interest is that we have on display here the parity between (i) the GATT Article I (MFN) and Article III (NT) rules, and Article 1 of the SCM Agreement, and (ii) the EU's competition rules. The EU law that allows the comparison is summarised by the Commission thus:

Article 87(1) EC Treaty⁶⁹⁵ declares incompatible with the common market any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, and affects trade between Member States.⁶⁹⁶

Also on display is a multinational oil-and-gas company. MOL, in *de facto* receipt of state aid by withholding the payment of mining fees that are due to the state. That MFN/NT-like rules (the EU's competition rules) are capable of disciplining MOL in this case, at least indirectly, is purely an accident of circumstance: there are oil companies operating in Hungary, albeit on very small scales,⁶⁹⁷ that are not owned by MOL. On 2007 data, '96% of all gas and 100% of all crude oil extracted in Hungary came from MOL

⁶⁹³ Ibid. para. 4, p. 2.

⁶⁹⁴ MOL capital and shareholder structure (approximate), http://www.mol.hu/en/about_mol/investor_relations/shareholder_info/ownership_structure/.

⁶⁹⁵ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2010/C 83/01.

⁶⁹⁶ Ibid. para. 17, p. 5.

⁶⁹⁷ Winstar Kft; Magyar Horizont Energia Kft; TXM Kft.

fields'.⁶⁹⁸ Had MOL been the only energy company registered and operating in Hungary, the competition issue could not have arisen in this EU context, and MOL's *de facto* state aid would have gone undetected, and state revenue would have been deprived of the mining fees that MOL is bound by local law to pay.⁶⁹⁹

The salutary point here is that, even in a state that is a parliamentary democracy and is a member of the EU – that is, in a state that exists in a sophisticated legal framework – an oil-and-gas-extracting multinational can obtain a relationship with a government that enables it to withhold the payment of mining fees, and thereby, to avoid the payment that is due to the state for extraction of its carbon materials. Many states, however, do not enjoy anything like the legal conditions of EU member states. In those less fortunate states, carbon-materials-extracting multinationals have, with the collusion of the wielders of state power, succeeded to deprive public revenue of the economic benefits, and hence of a chance of development, that should accrue to them from their reaping of the exhaustible natural resources of their lands. A new climate-change law must, therefore, put a firm end to these multinationals' failure to pay appropriate royalties/mining fees for the carbons they extract. Developing countries expect this perfectly reasonably.

The scramble for oil by the major oil giants in Africa is unconscionable. For instance, oil and gas operations are estimated to account for about 35 percent of Nigeria's GDP and over 80 percent of government revenue, but 'our own anti-corruption officials have

⁶⁹⁸ *Hungary – Alleged aid to MOL*, note 604, footnote 13, p. 6.

⁶⁹⁹ A communication to this thesis writer, received on 25 February 2010 from the European Commission, Directorate General Competition, State aids: Industrial restructuring.

estimated that 40 percent of the oil revenue is lost to corruption'.⁷⁰⁰ This state illustrates the existential import of the famous 'resource curse' hypothesis vividly.⁷⁰¹ Oil spills are frequent, because 'many oil production operations are carried out under sub-standard conditions',⁷⁰² and these spills cause a deterioration of the environment that deprives the population of its source of food, building materials and means of earning income.⁷⁰³

Appallingly wasteful production methods squander potential wealth and cause grievous health problems:

In Nigeria, most gas extracted through the oil production process is flared – gas which, if refined, would have a total value of \$15 million each day. Gas flaring creates large quantities of soot, smoke, and other air pollutants. Mercury, benzene and lead are common contaminants, which are often released into the environment if the gas is flared at temperatures that are too low. This cocktail of chemicals causes cancers, respiratory diseases and blood disorders.⁷⁰⁴

A Nigerian court declared gas flaring an illegal practice that violates human rights, and ordered its cessation.⁷⁰⁵ The order was not implemented.⁷⁰⁶ In addition, grave violations of human rights occur as a result of financial relationships between the armed security forces and the oil companies⁷⁰⁷ that enable them to call in mobile troops to attack local groups that gather to protest the conditions to which the companies subject them.

⁷⁰⁰ Testimony of Nnimmo Bassey, *The Oil Industry and Human Rights in the Niger Delta*, United States Senate Judiciary Subcommittee on Human Rights and the Law, 24 September 2008, p. 3, http://www.eraaction.org/publications/presentations/senate_testimony_24_09_2008.pdf.

⁷⁰¹ 'The negative indirect effects of natural resources on growth are shown to outweigh the positive direct effect by a reasonable order of magnitude': Papyrakis, Elissaios and Gerlagh, Reyer, *Journal of Comparative Economics* vol. 32, no 1, 2004, p. 181.

⁷⁰² Testimony of Nnimmo Bassey, note 612.

⁷⁰³ Ibid. pp. 3-4.

⁷⁰⁴ Ibid. p. 5.

⁷⁰⁵ Ziegler, Julie, 'Nigerian court orders an end to gas flaring', *Houston Chronicle*, 15 November 2005.

⁷⁰⁶ Testimony of Nnimmo Bassey, note 612, p. 6.

⁷⁰⁷ Ibid. pp. 7-16.

As the MOL case illustrated, trade law as it stands can constrain carbon-extracting multinationals only on the MFN and NT principles, and then only with regard to state subsidies, provided that such subsidies come to light. That is far less than enough to control those multinationals' GHG emissions. Oil companies must be bound to standards of behaviour with regard to the environments in which they are operative. Most urgently, they must not be allowed to leave people without the means of moving themselves into an environment that is beyond the reach of the health-destroying detritus and practices of oil and gas extraction. Without a law to regulate them, GHG emissions will not be reduced in the very part of the world most sensitive to the effects of climate change.

The carbon-fuels extractor problem cannot be resolved in the WTO/GATT scheme. Carbon fuel extractors are inevitably multinational companies, and they are not subject to any international convention, for they are not countries. Besides, the carbon trade is conducted independently of the WTO. The GHG emissions problem these multinationals create can be resolved only with the intervention of the United Nations Organisation (UN).

It is therefore necessary that a part of the new climate-change law be brought into being by UN legislation. The WTO is not a legislative body, and besides, the targets of the desired legislation, the carbon-fuels extracting multinationals, are beyond its jurisdiction, for they are not states. That law should require UN member states intending to allow oil-and-gas-extracting multinationals to operate on their territories to include it in the domestic legislative scheme. Its key provisions of that law should be that these

multinationals are (i) subject to the supervision of the Intergovernmental Panel on Climate Change (IPCC), which is also the authority that issues their licences to operate.

(ii) The granting of those licences is contingent upon their satisfying the IPCC that their extracting and refining procedures will deploy the best available ‘clean’ technology, and upon their undertaking that, where environmental degradation and air pollution are inevitable and unavoidable, local populations will be evacuated and relocated at the multinational’s expense, and compensated adequately by it for loss of income as a consequence of that multinational’s activities. Where a multinational company is already active, it will (iii) apply to the IPCC for a permit to continue that activity, which permit will be granted on the same grounds that a licence to begin operations is granted.

(iv) Failure to comply with the provisions of this law will incur the penalty the IPCC sees fit to impose, which may range from an IPCC-imposed fine to referral by it to the International Criminal Court.

A firm UN law along these lines will put a swift end to unconscionable GHG-emissions of multinational carbon fuel extractors, and to their other kinds of destructions of the natural environment and the human and animal health and habitat.

The UN Security Council clearly has the requisite legislative power, in the light of its legislative moves with regard to the terrorism issue with Resolutions 1373⁷⁰⁸ and 1540.⁷⁰⁹ Acting under Article 48⁷¹⁰ (a Chapter VII enforcement power) of the United Nations

⁷⁰⁸ *Threats to international peace and security caused by terrorist acts*, UN Doc. S/RES/1373 (2001), 28 September 2001.

⁷⁰⁹ *Non-Proliferation of Weapons of Mass Destruction*, UN Doc. S/RES/1540 (2004), 28 April 2004.

⁷¹⁰ The two parts of Article 48 require all UN member States to implement UNSC Resolutions: ‘1. The action required to carry out the decisions of the Security Council for the maintenance of international peace

Charter, the Security Council adopted 1373,⁷¹¹ which required action by all states to prevent and suppress the financing of terrorist activities. In practice, this meant that all UN member states were obliged to include this, effectively a Security Council directive, in their national legislations. Resolution 1540,⁷¹² of which the subject is the non-proliferation of weapons of mass destruction, made the same demand.

The difficulty as to which Security Council member state would propose the requisite draft Resolution can be overcome by the IPCC's calling upon the UN Director-General to do so. Should it be objected that the climate-change issue is not a Chapter VII matter, for it is not a matter of the preserving of world peace, it can be counter-argued that the 'responsibility to protect' doctrine has acquired a Chapter VII status in the UN with the declaration of the Secretary General that the international community has a responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity, and that the UN is 'prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII' to provide that protection.⁷¹³ (It is arguably a crime against humanity to render the earth unable to sustain human life. The UN was able to include the 'responsibility to protect' doctrine into the UN regime, despite the fact that there is no Charter basis for doing so. Having done that, there is no reason why it cannot now expand its current list of 'crimes against humanity' to include 'destruction of the habitable environment'.)

and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine. 2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members'.

⁷¹¹ *Threats to international peace*, note 708.

⁷¹² *Non-Proliferation of Weapons of Mass Destruction*, note 709.

⁷¹³ *Implementing the responsibility to protect, Report of the Secretary-General*, UN doc. A/63/677, 12 January 2009.

That the Security Council is now well on the way to acquiring an extra-Charter mandate to engage directly in the amelioration of the effects of GHG emissions to which climate change is attributed is now beyond doubt. Perhaps the most influential document to construct this mandate is UN General Assembly Resolution 63/281,⁷¹⁴ which explicitly links the UN Security Council's Charter-conferred 'primary responsibility for the maintenance of international peace and security' and the General Assembly's own 'responsibility for sustainable development issues, including climate change', and calls upon 'the Secretary-General to submit to it a comprehensive report to the General Assembly at its sixty-fourth session on the possible security implications of climate change'. Should climate change be found to be a matter of international peace and security, the Security Council's Chapter VII powers are invoked. This enables the Security Council to take all necessary action to maintain world peace, including the use of force.

Muscular legislative intervention is essential to regulate the GHG-emitting activities of oil-and-gas-extracting multinationals. Assurances such as that of Frynas⁷¹⁵ to the effect that these multinationals are aware of their social responsibilities and are responding to them are well and good. But the present writer submits that a coercive element of the new climate law that provides as outlined above will assure that theirs are prompt responses to substantive GHG emissions reductions, not mere public relations exercises. Indeed, a climate law that does not discipline oil-and-gas extractors would be feeble, given that this sector is one of the grossest emitters of GHG.

⁷¹⁴ *Climate change and its possible security implications*, UN doc. A/RES/63/281, 11 June 2009.

⁷¹⁵ Frynas, Jędrzej George, 2009, *Beyond Corporate Social Responsibility: Oil Multinationals and Social Challenges*, Middlesex University Press.

7.5 The climate-policy inhibiting investor

Cordonier Segger and Gehring call attention to the unfortunate condition in which foreign investors are granted the right by host states to challenge them in ICSID and UNCITRAL forums on performance requirements, fair and reasonable treatment grounds, expropriation and transparency.⁷¹⁶ They note that ‘the very existence of a government-imposed cap on the amount of carbon that can be emitted by a given sector’ can, given the terms of the state-investor contract, lead to challenge in those forums. And they cite the Ethyl Corporation’s action against the Government of Canada⁷¹⁷ as an example of a claim, under the UNCITRAL Rules, of indirect expropriation and performance requirements as consequence of a government measure that affected the value of the foreign investment. These commentators note that ‘such issues could arise for governments implementing climate change measures’, and that governments can be ‘chilled’ by them into choosing not to implement those measures.⁷¹⁸

This is particularly severe, for the status of investor-state contracts *vis-à-vis* the WTO disciplines is established nowhere. That leaves the ICSID and UNCITRAL contracts free to impose severe fines against the investor’s host state. Only the host states have the power to conclude ICSID and UNCITRAL contracts such that the climate-related actions of states are rendered immune from investor claims against them on performance requirements, fair and reasonable treatment expropriation and transparency grounds. If the host state in a poor non-Annex 1 country, it is likely that it cannot dictate the terms of

⁷¹⁶ Cordonier Segger, Marie-Claire and Gehring, Markus, 2009, ‘Trade and Investment Implications of Carbon Trading for Sustainable Development’, in *Legal Aspects of Carbon Trading: Kyoto, Copenhagen, and beyond*, Freestone, D. and Streck, C. (eds), Oxford University Press, p. 93 et seq.

⁷¹⁷ ‘Ethyl Corp. v. Government of Canada’, US State Department, <http://www.state.gov/s/l/c3745.htm>.

⁷¹⁸ Cordonier Segger and Gehring, note 716, p. 94.

the contract with the investor. But then, UNCITRAL is a UN body, and so, really, is ICSID, given that it is an arm of the World Bank. Surely, the UN can require these bodies to remove from their contracts the right of investors to demand compensation from host states for loss they suffer as a consequence of those states' climate-concerned initiatives.

7.6 Conclusion

This Chapter made out a case for the coming into being of a new climate change law, having previously noted that paragraph 31(i) of the Doha Declaration amounts to a *de facto* licence to construct a climate law. It proposed that the advent of this law is necessary to create a relationship between MEAs and the GATT/WTO legal scheme, demonstrated that 'common but differential responsibility' is the dominant value in MEAs, and argued that this value is put into practice in the new climate law as the principle of distributive justice. Having surveyed the key MEAs' (the UNFCCC's and the Kyoto Protocol's) applications of the 'common but differential responsibility' value, this Chapter pointed out which of them is an application consistent with the international distributive justice principle, and recommended that only those consistent with it be retained in the new climate law. Those to be retained commend the distribution of obligations, and those to be abandoned commend the redistribution of goods such as technology, or commend retributive justice, such as the requirement that Annex 1 countries pay for the climate damaged caused by the GHG emission levels that their forebears allowed.

The UNFCCC was criticised for having failed to seek to amend the GATT Article XX (b) and (g) rights to impose BTAs, and for having therefore jeopardised the ‘common but differentiated responsibility’ value it had espoused, and with that, disabled its own commitment to the view that only Annex 1 countries have GHG emission-reducing obligations. GATT Article XX (b) and (g) provisions were then examined, and it was noted that the BTAs they enable do indeed work against the realisation of an international distributive justice in which non-Annex 1 countries have no obligations to reduce their GHG emission levels. BTAs do this by closing markets to non-Annex 1 countries on a number of health and environmental grounds, including on the ground of these countries’ PPMs. It was noted that there is no challenge to GATT Article XX (b) and (g) from WTO Agreements, a number of which in fact support it. It was posited in this vein that the DSB itself is disposed to defend countries against challenge of their BTAs. This segment of the Chapter concluded that the new climate law might succeed to limit the range of BTAs based on GATT Article XX (b) and (g) by disallowing ones that are not imposed to divert threat to life, health and environment in the jurisdiction of the state that imposes them.

An argument was propounded to the effect that the disabling of countries’ carbon-leakage prevention measures, those that are achieved by means of awarding free carbon credits to certain installations, is unfortunate. Those credits would probably be considered, on the SCM Agreement, to be a form of tariff protection. It is unfortunate because the interest of repairing damage done by GHG emissions is not served when the SCM Agreement drives emitters out of capped (or taxed) Annex 1 countries into non-Annex 1 countries. This point led to the condemnation of the carbon-credit market as counterproductive in the

effort to reduce GHG emission levels, on the ground that the private financial industry that has gained control of it lets the most rampant emitters consume the bulk of carbon credits, which ‘rescues’ them from having to meet their emission targets. It was recommended that the carbon-credits market be brought into the GATT/WTO context by the new climate law on the basis of GATT Article XI(1), so that the present carbon-market is deflated by the taxation of carbon-credit exports.

A final point was made that for the new climate law to be effective, UN intervention is required on two fronts: one against oil-and-gas-extracting multinationals, the other against ICSID and UNCITRAL rules can make provision for applying climate change law irrespective of what parties choose as applicable law to their contracts. Control of the GHG-emitting activities of oil-and-gas-extracting multinationals is beyond the powers of GATT/WTO law, for those multinationals trade outside it, and they are ‘individuals’ (that is, not states) with whom the WTO cannot form agreements. These multinationals are rarely ‘caught’ by trade law rules that govern other industries, and then only by accident, as the Hungarian MOL case illustrated. It was recommended that a UN law come into being that requires states that allow the activities of these multinationals to include that law in their domestic legislative schemes. It was recommended also the UN intervene to disallow ICSID and UNCITRAL arbitration rules that enable investors to inhibit the implementation of host states’ climate policies.

Chapter 8 will look at the dispute-settlement mechanisms that regulate investment and trade. Tracing the origin and practice of the investment-related mechanism and the trade

(WTO) mechanism, it will be argued that the latter holds less threat for least-developed nations than does the former.

Chapter 8

The Dispute Settlement Mechanisms of Foreign Investment and Trade: Their Legal and Social Deficits and Their Effect on Developing Countries

8.0 Introduction

Although Article I(2)(c) of the GATS brings investors into the WTO ambit as the ‘commercial presence’ of one member state on the territory of another member state, the dispute-settlement mechanisms of foreign investment and international trade have remained separate. Even so, the former has to be discussed in the context of the latter, for it has obvious effects on the development through trade of WTO member states. That is, development through trade is sabotaged, especially in weak or temporarily troubled economies, when investment tribunals impose punitive fines on them. Also, as it was noted in Chapter 7 of this thesis (at 7.5), the operation of international distributive justice in the WTO context cannot be made effective without UN intervention that would discipline the arbitration rules of investment tribunals that block the possibility of its operation. Having referred to a major adverse effect of investment-tribunal rules in the very part of this thesis that displays a feasible application of international distributive justice in the WTO regime, it is essential to sketch their broad effect on WTO member states. Accordingly, this Chapter will trace the development as internationally significant law of both the WTO dispute settlement mechanism (DSM) and of the various investment-related ones, and notably, the emergence of the bi-lateral investment treaties (BITs). The role of the International Centre for Settlement of Investment Disputes

(ICSID) will be looked at closely, for that Convention is presently the most used,⁷¹⁹ notably in important contexts such as the North American Free Trade Agreement (NAFTA, Chapter 11) and Energy Charter Treaty (ECT), and in many other free trade agreements (FTAs). Close attention is paid to the extent to which ICSID tribunals have succeeded to enunciate international law regarding investment, and to the extent to which the Convention and its tribunals' decisions have delivered sound outcomes, that is, to how ICSID has impacted on foreign direct investment (FDI) in Bangladesh and the UAE, and how its sidelining has effected FDI in Brazil. The WTO DSM is then traced briefly, with a view largely to comparing that system favourably with ICSID's, but also to call attention to the legal deficits of the central concept, 'non-discrimination' that is common to both systems.

8.1 Dispute settlement mechanisms for the protection of foreign investment

Early international dispute settlement mechanisms addressed the protection of investment and investment property, not international trade. The typical dispute therefore centred on expropriation issues. Legal criteria were typically dependent on treaties, and on the acceptance as customary international law of the standard of compensation 'prompt and adequate payment' due to the foreign owners of property expropriated by the host state. A famous case of the enunciation of this standard as international law is the decision in the *Chorzow Factory Case*,⁷²⁰ brought by the Permanent Court of International Justice (PCIJ), the international court established by the League of Nations in 1922. The legal

⁷¹⁹ Schreuer, Christoph, 'Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road', vol. 5, *Journal of World Investment & Trade*, 2004, p. 231; Neufeld, Paul J. and Sabater, Anibal, 'The Enforcement of Annulled Foreign Awards: Worldwide Trends', *Fulbright International Arbitration Report*, 2008, p. 15.

⁷²⁰ *Factory at Chorzow (Germany v. Poland)*, Judgment 15 May 1926, PCIJ, Serial A, Numbers 7.

foundation of the Court's decision was the Treaty of Versailles, concluded in the wake of World War I, in 1919. This Treaty brought into being the Covenant of the League of Nations (Articles 1 -26) which announced the imminent establishment of the PCIJ, pursuant to Article 14 of that Treaty. The Court was established in 1921.

Pursuant to Article 27(7) of the Treaty, Germany ceded the Chorzow region of Upper Silesia to Poland. Pursuant to Article 120 of the Treaty, the countries that took over German territory had the right to seize land owned by the government of Germany, and to credit the value of such land to Germany's war reparation obligations as imposed by the Treaty. But this Article did not confer the right to seize privately German owned property. Upon taking over Chorzow, the Polish Government seized the entire property of the privately owned factory, *Oberschlesische Stickstoffwerrke AG*. When the ensuing dispute came before the PCIJ, that Court decided against the Polish Government, deeming the appropriation to be 'a derogation from the rules generally applied in regard to the treatment of foreigners and the principle of respect for vested rights'.⁷²¹ (Had the seized property been state owned, the Treaty would not have worked in *Oberschlesische Stickstoffwerrke AG*'s favour.) This Court awarded compensation to *Oberschlesische Stickstoffwerrke AG*, at a level that would 'wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'.⁷²²

⁷²¹ Ibid. at 452.

⁷²² Ibid. at 453.

It is noteworthy that this Court held also that there had been not only an expropriation of the factory owner's property, but also of the company, *Bayerische*, that had held the contractual rights to its management.⁷²³ There can be no doubt that this Court enunciated international law regarding both expropriation and indirect expropriation of foreign-owned property by a host state, having derived its jurisdiction from Article 23 of the Convention regarding reparation and compensation. It established the principle that while expropriation is not illegal *per se*, failure to compensate is. This Court is reasonably said to have served as the first modern international dispute resolution forum.

8.1.1 The BITs emerge

The first bilateral investment treaty (BIT) was concluded between Germany and Pakistan in 1959.⁷²⁴ BITs protect foreign direct investments (FDI) schemes, and they occasion the emergence of bodies such as ICSID that set themselves up as arbitrators of foreign-investment related disputes. These bodies gain their legitimacy from being 'conventions' to which states accede and member states and/or member-state private entities designate them as the arbiters of disputes between international investors and investment-host states.

Despite the BITs and their dispute-resolution forums, and, as Choharis points out, despite the importance of FDI to world economic growth, 'international legal protections against government deprivation of the property rights of foreign nationals ... remain distressingly

⁷²³ Ibid. at 454-5.

⁷²⁴ Embassy of the Federal Republic of Germany in Islamabad, 'Bilateral treaty on the protection and promotion of investment', 1 December 2009, http://www.islamabad.diplo.de/Vertretung/islamabad/en/05__Business/1__ExternalEconomicPromotion/Invest_Schutz_Abk_Seite.html.

unclear'.⁷²⁵ Choharis proceeds to note that not even the scholars who have investigated the decisions of various courts on whether there is an act of expropriation when a government forces the re-negotiation of contracts are in complete agreement. He notes also (in passing) that 'discrimination is a strong *indicium* of a violation of international law'.⁷²⁶ There is, however, an invalidation of this view by prominent scholars, with whom the present writer is in agreement:

Professor Maniruzzaman⁷²⁷ points out the impossibility of a legally 'absolute' sense of 'non-discrimination' by examining applications of this concept as customary international law and as conventional international law. He concludes on the basis of this examination that this concept compels juristic compromise. In short, non-discrimination is not an established principle of international investment law. Maniruzzaman also rejects the possibility that the equal-treatment concept MFN might be imported from the international trade law context into the international investment law context, and thereby achieve a clarity of meaning for non-discrimination in international investment law. He rejects it on the basis that both MFN and otherwise-worded non-discrimination standards 'are treaty-made and neither is recognised as part of customary international law'.⁷²⁸

Recognised shortage of international law governing international investment gave rise to the idea of the (now defunct) Multilateral Agreement on Investment (MAI). That was to

⁷²⁵ Choharis, PC, 'US Courts and the International Law of Expropriation: Towards a New Model for Branch of Contract', vol. 80, no. 1, *Southern California Law Review*, 2006, p.4.

⁷²⁶ Ibid. p. 30.

⁷²⁷ Maniruzzaman, AFM, 'Expropriation of Alien Property and the Principle of Non-Discrimination in International law of Foreign Investment: An Overview', vol. 8, no. 1, *Journal of Transnational Law & Policy*, 1988, pp. 57 – 77.

⁷²⁸ Ibid. pp.60 - 70.

be a means of the liberalising states' investment regimes by means of a multilateral agreement concerning the protection of investment. The MAI was to have its own dispute settlement system. But negotiations on the drafting of the MAI terms broke down with the withdrawal of France in 1988. To date, therefore, investment law that is unequivocally international law remains thin. International investment law is therefore made 'on the hop' by inter-state treaties (the BITs) and by the dispute-settlement bodies those BITs designate as their arbitration forums. Popular forums are the International Centre for Settlement of Investment Disputes (ICSID), International Chamber of Commerce (ICC), the Multilateral Investment Guarantee Agency (MIGA), and the Overseas Private Investment Corporation (OPIC). Some BITs choose as their dispute-resolution forum an approach to the International Court of Justice (ICJ)⁷²⁹ or the United Nations Commission on International Trade Law (UNCITRAL), or the Permanent Court of Arbitration (PCA)⁷³⁰ with a request that these bodies appoint a tribunal for dispute-settlement purposes. Where the ICJ is the BIT-specified forum creator,⁷³¹ it is implicit that the disputing parties are states, not private entities and states. The European Court of

⁷²⁹ The ICJ has jurisdiction if State parties consent that it does: Only state parties can consent to ICJ jurisdiction: Article 35(1) of the Statute provides that the Court 'shall be open to all states parties to the present Statute'. According to the ICJ itself, the principle that 'the Court can only exercise jurisdiction over a State with its consent' is 'a well established principle of international law embodied in the Court's Statute': 'Monetary Gold Removed from Rome in 1943', *Italy v. France, United Kingdom and United States*, ICJ Reports 1954, 19, para. 32; 'Case Concerning East Timor', *Portugal v. Australia, Judgment*, ICJ Reports 1995, 87, 101, para.26.

⁷³⁰ Established by the Convention for the Pacific Settlement of International Disputes, concluded at The Hague in 1899, then revised by the second Hague Peace Conference in 1907. A BIT sample of it is between Bangladesh and Iran, http://www.unctad.org/sections/dite/iaa/docs/bits/bangladesh_iran.pdf.

⁷³¹ For a sample of a BIT that specifies the ICJ as the dispute-resolution forum, see Article 9(4) of the Russian-Hungarian BIT of 1996. Article 8(1)(c) of that BIT names UNCITRAL as the body to appoint the dispute-settlement tribunal of first resort.

Justice is not an investment dispute-resolution forum. Although Article 2 of the *Treaty on the Functioning of the European Union* (TFEU)⁷³² provides that:

... only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts',

it contemplates only investment liberalisation, that is, the pre-establishment regulation of internal and external market access and the provision of national treatment. Investment protection remains in the scope of EU member states' BITs.⁷³³

8.1.2 The ICSID

The vast majority of known investment treaty arbitrations are filed at ICSID. Last year, 27 of the 35 known investor-state arbitrations were administered at ICSID.⁷³⁴

The ICSID was established in 1965, under the auspices of the World Bank and by instrument of the *ICSID Convention, Regulations and Rules*. As its formal name, Convention on the Settlement of Investment Disputes between States and Nationals of Other States, and its Article 25(1) make clear, this Conventions exists solely for the purpose of arbitrating *investment* disputes, and it limits its jurisdiction to investment disputes. Article 25(1) provides thus:

⁷³² *The Treaty of Lisbon*, amending the *Treaty on European Union* and the *Treaty Establishing the European Community*, was signed at Lisbon on 13 December 2007 and came into force on 1 December 2009. It amends, but does not replace, both the *Treaty on European Union* (formerly known as the Maastricht Treaty) and the *Treaty establishing the European Community* (formerly known as the EC Treaty or Treaty of Rome) is now renamed as the *Treaty on the Functioning of the European Union*, <http://ld.practicallaw.com/2-107-6192>.

⁷³³ Maydell, N. 'The European Community's Minimum Platform on Investment or the Trojan Horse of Investment Competence', in Reinisch, A. and Knahr, Ch. (eds.), *International Investment Law in Context*, 2007, Boom Eleven International, p. 73.

⁷³⁴ Malik, Mahnaz, 'Recent Developments in the Definition of Investment in International Investment Agreements', International Institute for Sustainable Development, 2nd Annual Forum of Developing Country Investment Negotiators, Marrakech-Maroc, 3-4 November 2008, p. 9, http://www.iisd.org/pdf/2008/dci_recent_dev.pdf.

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

Yet the Convention does not seek to define ‘investment’. Its Article 25(4) acknowledges this:

No attempt was made to define the term ‘investment’ given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre.

Dominique Grisay finds⁷³⁵ that in its 2006 decision in *LESI Spa & ASTALDI Spa v.*

*Algeria*⁷³⁶ the ICSID tribunal summarised the criteria for what constitutes an investment at paragraph 72:

- a. the contractor has realised a contribution in the country concerned;
- b. this contribution is made for a certain duration of time and;
- c. it incurs a certain risk for the investor.

(Grisay’s translation of the original’s French.)

8.1.3 Is there a development agenda in ICSID’s ‘investment’?

Grisay notes that despite the implications to the contrary of the above-sited criteria of what constitutes an investment, the decision that enunciated it ‘does not foresee that the contribution should help the economic promotion of a country’. Grisay points out that this has taken developing countries aback. The Philippines, for instance, having lost its

⁷³⁵ Grisay, Dominique, ‘International arbitration: the ICSID Convention: a convenient solution for companies in conflict with states, vol. 6, issue 1, *International Legal News*, 18 March 2007, http://www.imakenews.com/iln/e_article000763642.cfm?x=b11,0,w.

⁷³⁶ *LESI Spa & ASTALDI Spa v. Algeria*, CIRDI No. ARB/05/03 (ICSID, July 2006)

case to SCG,⁷³⁷ decided that there would be no further resort to ‘arbitration with foreign companies, and modified a new BIT accordingly’. He adds:

The Pakistani Attorney General recently declared at an ICSID seminar that if Pakistan had known how the ICSID convention was going to be applied, its country would not have signed the Convention or would have limited drastically its scope of application.

However, although Grisay’s analysis of the *LESI Spa & ASTALDI Spa* case is sound, it is also true that the ICSID tribunal’s 2004 award in *Mitchell v. DRC* was annulled by the subsequent ICSID tribunal of 2006.⁷³⁸ This tribunal denied that Mitchell’s operation, a law firm in the Democratic Republic of Congo (DCR), the status of investment precisely because that operation did not contribute to ‘the economic development or at least the interests of the State’:

As a legal consulting firm is a somewhat uncommon operation from the standpoint of the concept of investment, in the opinion of the *ad hoc* Committee it is necessary for the contribution to the economic development or at least the interests of the State, in this case the DRC, to be somehow present in the operation.⁷³⁹

Does this annulment repair the ‘development’ deficit in the ICSID tribunal’s sense of ‘investment’ that Grisay points to? The awful situation is that this question must elicit a ‘don’t know’ answer, for ICSID tribunals are not famous for their consistency, so the annulment of the *Mitchell v. DCR* award cannot be relied upon as the definitive case to establish that ‘investment’ in the ICSID sense does have a ‘development’ pre-requisite. That the first ICSID tribunal found in Mitchell’s favour constitutes the credibility

⁷³⁷ *Société Générale de Surveillance SA v. Republic of the Philippines*, case No ARB/02/6 of January 29, 2004.

⁷³⁸ *Patrick Mitchell v. The Democratic Republic of Congo*, ICSID Case No. ARB/99/7, 2006.

⁷³⁹ *Ibid.* para. 39.

problem: How could it have done so, given that the first recital of the ICSID Convention specifically ties in the intention of contracting states with development:

Considering the need for *international cooperation for economic development*, and the role of private international investment therein ... [italics added]

Whatever the purpose in the ICSID's having intentionally left 'investment' undefined, part of that purpose cannot have been to subsume in it the economic activity of non-nationals in a state that serves only their own enrichment. Being an arm of the World Bank, development intent and effect should be the ICSID pre-requisite of 'investment' status. That it will become established as such a pre-requisite remains to be seen.

That said, it is fair to note that there are more optimistic views of the ICSID tribunals' attitudes to the 'development' pre-requisite of 'investment'. Malik holds⁷⁴⁰ that since Schreuer published his view that:

... the basic features of an investment have been described as involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host state's development ..., ⁷⁴¹

the ICSID tribunal adopted that view in *Fedax*,⁷⁴² and regularly since then. Malik's list of cases in the course of discussion is impressive, as is his analysis of their decisions regarding 'investment'. It would have been interesting to hear how Malik accounts for the departure from the Schreuer position of the *LESI Spa & ASTALDI Spa* tribunal and the first *Mitchell* tribunal. It is well and good to note that 'there is no concept of binding

⁷⁴⁰ Malik, note 734, pp. 10 - 14.

⁷⁴¹ Schreuer, Christof, 2001, *The ICSID Convention: A Commentary*, Cambridge University Press, p. 89.

⁷⁴² *Fedax NV v Republic of Venezuela* (Jurisdiction) 5 ICSID Rep 183, 1997.

precedent in international investment law'.⁷⁴³ But surely this does not allow for fundamental inconsistency of decisions on the same issue.

8.1.4 Is there legal certainty in ICSID tribunals' decisions?

The problem for both the Philippines and Pakistan was the ICSID tribunals' evolving position on whether the forum-selection clause of a BIT is overridden by the BIT provision that provides for ICSID arbitration. The ICSID tribunal's decision in this matter would determine whether ICSID has jurisdiction only over the treaty issues of the BIT and not over its contract issues, or whether the BIT elevates the contract issues to bring them into ICSID jurisdiction. In two earlier decisions, *Lanco*⁷⁴⁴ and *Vivendi*,⁷⁴⁵ the ICSID tribunals had decided that they have jurisdiction where both parties to the BIT have agreed to it. The *Lanco* tribunals found that Argentina's settlement clause in the concession agreement did not supplant consent to ICSID jurisdiction in Article VII(4) of the BIT, and allowed the complaint to proceed to ICSID arbitration.⁷⁴⁶ The *Vivendi* tribunal, however, found that it could not hear CGE's case until CGE submits it to the local court specified by the BIT, and then only if that local court demonstrably (either procedurally or substantively) denies CGE's rights.⁷⁴⁷

The ICSID tribunal in the Pakistan case⁷⁴⁸ decided similarly, following *Vivendi*, deeming that it does have jurisdiction over the contractual matters of the BIT. Yet in the

⁷⁴³ Malik, note 734, p. 11.

⁷⁴⁴ *Lanco v. Argentina*, ICSID Case No. ARB/97/6, 2002;.

⁷⁴⁵ *Vivendi v. Argentina*, Decision on Annulment, ICSID Case No. ARB/97/3, 2002

⁷⁴⁶ *Lanco*, note 655, para. 38.

⁷⁴⁷ *Vivendi*, note 656, para. 78.

⁷⁴⁸ *Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, 2004

Philippines case,⁷⁴⁹ the tribunal decided that it does not have jurisdiction over the contract-concerned matters of the BIT, and that that jurisdiction remained with the one designated by the forum-selection clause of the BIT.

Whereas the ICSID tribunal went in Pakistan's favour, it did not go in the Philippines' favour. The fact that the two cases were close to identical, and that the ICSID tribunals' decisions were nonetheless at odds, tells sharply against the reliability of those tribunals. Apologists for these ICSID decisions, such as Matthew Wendtland,⁷⁵⁰ simply dismiss this obvious inconsistency by arguing that the Pakistan case was wrongly decided, because that tribunal had applied *Vivendi* wrongly,⁷⁵¹ and that 'it is now widely accepted that ICSID tribunals have jurisdiction over BIT claims notwithstanding a forum-selection clause in the contract'.⁷⁵² What then, is the role in the BIT of the forum-selection clause?

Wendtland's analysis is surprising for its 'applied *Vivendi* wrongly' claim. The ICSID tribunal itself does not give ICSID-tribunal precedents the status of binding decisions that Wendtland gives them. Logically, a precedent cannot be 'wrongly applied', or for that matter, 'correctly applied', if there is no regime of binding precedent. And the ICSID Philippines tribunal itself declared that there is no such regime:

The ICSID Convention provides only that awards rendered under it are 'binding on the parties' (Article 53(1)), a provision which might be regarded as directed to the *res judicata* effect of awards rather than their impact as precedents in later cases. In the Tribunal's view, although different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the

⁷⁴⁹ *Société Générale de Surveillance v. Republic of the Philippines*, ICSID Case No. ARB/02/6, 2004.

⁷⁵⁰ Wendtland, Matthew, 'SGS v. Philippines and the Role of ICSID Tribunals in Investor-State Contract Disputes', vol. 43, *Texas International Law Journal*, May 2008.

⁷⁵¹ *Ibid.* p. 549.

⁷⁵² *Ibid.* p. 523.

end it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and each Respondent State. Moreover there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision. There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals. It must be initially for the control mechanisms provided for under the BIT and the ICSID Convention, and in the longer term for the development of a common legal opinion or *jurisprudence constante*, to resolve the difficult legal questions discussed by the *SGS v. Pakistan* Tribunal and also in the present decision.⁷⁵³

If Wendtland nevertheless turns out to be right, then the ICSID has succeeded to collapse the traditional distinction between treaty-based claims (the province of international law) and contract-based claims (the province of national law). This is grim news indeed for developing countries, for it means that they have lost to the ICSID all national control of investors. It is obvious that the poorer developing and least-developed countries are in need of investors. It is also true that the investor-preferred BIT is the one that chooses the ICSID as the arbitration forum. Wendtland triumphantly cites Paulsson on this point:

Most specialists would agree that ICSID arbitration is an intrinsically superior mechanism in certain contexts. An ICSID award, rendered in accordance with one of the most universally accepted international treaties, may be expected to have an exceptionally high degree of authority.⁷⁵⁴

But where do the *Pakistan* and *Philippines SCG* decisions leave the ICSID with regard to legal certainty? The decisions in these two cases, despite their near-identical claims and BIT provisions, were diametric opposites. Thus whatever is the ‘degree of authority’ of which Paulsson speaks is certainly not legal authority. The present writer proposes that ICSID authority is more akin to the coercive authority of the World Bank. This view is

⁷⁵³ *Société Générale de Surveillance SA v. Republic of the Philippines*, note 737, para. 97.

⁷⁵⁴ Paulsson, Jan, 1996, ‘Dispute Resolution’, in *Economic Development, Foreign Investment and the Law: Issues of private Sector Involvement, Foreign Investment and the Rule of Law in a New Era*, Robert Pritchard (ed.) Kluwer Law International & the International Bar Association, pp. 209, 219.

certainly not likely to be modified in the light of another set of decisions that cut across each other in a way that should have embarrassed the ICSID severely: The *CMS v. Argentina*⁷⁵⁵ tribunal decided that the economic and political situation in Argentina between 2001 and 2003 was not sufficiently grave to exempt it from a finding of liability for breach. Yet only a year later, the *LG&E v. Argentina*⁷⁵⁶ tribunal decided that during the same period there was a state of necessity that was sufficiently grave to exempt Argentina from liability for breach. As if this were not enough, in *Enron v. Argentina*⁷⁵⁷ another ICSID tribunal found ‘that the requirements of the state of necessity under customary international law [had] not been fully met in this case’.⁷⁵⁸ So on the very same factual situation about the very same period, an ICSID tribunal decided that the necessity defence was and was not available to Argentina. The ‘authoritative’ nature of this body quite eludes the present writer’s perception.

Argentina filed for the annulment of this award on 7 March 2008. Reference to this is made in the second tribunal decision to stay the enforcement of this award: ‘... the stay of enforcement of the Award will continue in effect for the duration of these annulment proceeding’:

‘On February 21, 2008, the Argentine Republic (“Argentina”) filed with the Secretary-General of the International Centre for Settlement of Investment Disputes (“ICSID”) an application in writing (the “Application for Annulment”) requesting the annulment of the Award of May 22, 2007 (the “Award”), rendered

⁷⁵⁵ *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005.

⁷⁵⁶ *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006.

⁷⁵⁷ *Enron Corporation Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007.

⁷⁵⁸ *Ibid.*, para. 331.

by the tribunal (the “Tribunal”) in the arbitration proceeding between Enron Corporation and Ponderosa Assets, L.P. (the “Claimants”) and Argentina.⁷⁵⁹

The stay of enforcement was granted pursuant to ‘the ICSID Convention and Rule 54(2) of the ICSID Arbitration Rules’:

The ad hoc Committee decides that pursuant to Article 52(5) of the ICSID Convention and Rule 54(2) of the ICSID Arbitration Rules, the stay of enforcement of the Award will continue in effect for the duration of these annulment proceedings.⁷⁶⁰

The text of the Argentine annulment application has not been released, and in mid-May 2010, there has been no decision in this matter. However, Professor Asif Qureshi⁷⁶¹ provides an authoritative discussion, ‘from a development perspective’, of:

... the objective review of the economic emergency security defence in BITs; the interpretative approach to the economic emergency security defence in BITs; the processes involved in the interpretation of the economic emergency security defence in BITs.⁷⁶²

He begins by noting that A.K. Bjorklund,⁷⁶³ citing *LG&E Energy Corp et al v. The Argentine Republic*,⁷⁶⁴ considers that ‘[i]t is settled now that the provision of “national security” encompasses “severe economic crises”’.⁷⁶⁵ The contention that ‘the object and purpose of BITs suggest a restrictive approach to interpreting the economic emergency

⁷⁵⁹ *Enron Creditors Recovery Corp. & Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3) (Annulment Proceeding), Decision on the Claimants’ Second Request to Lift Provisional Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), 20 May 2009.

⁷⁶⁰ Ibid. ‘Decision’, p. 21.

⁷⁶¹ Qureshi, Asif H, 2009, ‘The Economic Emergency Defence in Bilateral Investment Treaties: A Development Perspective’, in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, Binder, Christina, Kriebaum, Ursula, Reinisch, August and Wittich, Stephan (eds), Oxford University Press, pp. 631 - 635.

⁷⁶² Ibid. p. 631.

⁷⁶³ Bjorklund, AK, 2008, ‘Economic Security Defences in International Investment Law’, in Muchlinski, P, Ortino, . and Schreuer, C (eds), *The Oxford Handbook of International Investment Law*, Oxford University Press, p.459.

⁷⁶⁴ ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, 46 *ILM* (2007) 36, para 238.

⁷⁶⁵ Qureshi, note 761, p. 631.

exception', he notes later, 'is based on the reasoning in [para. 331] of the *Enron Award*',⁷⁶⁶ which asserted (according to Bjorklund) 'that the very object and purpose of the treaty was to apply in situations of economic difficulty and hardship in order to guarantee the rights of the treaty's beneficiaries', and that therefore a restrictive approach to interpreting the economic emergency exception is mandatory.⁷⁶⁷

Qureshi, however, disagrees. He concedes that 'BITs are intended to deal with investment protection, including particularly when the host State is in difficulty', but notes that 'it is less clear if BITs are intended to afford protection in the extraordinarily difficult circumstances of an economic emergency'. His salient points are (i) that a state is unlikely to 'consent to an investment agreement in which it is obligated to continue honouring its obligations in circumstances of extraordinary crisis', and (ii) that when a treaty includes a provision 'which refers to an economic emergency situation', that provision must be recognised to have effect, because a treaty interpreter is not free to render the terms of a treaty redundant.⁷⁶⁸ He notes also that the interpretation of treaty exceptions is governed by 'Articles 31 - 3 of the VCLT',⁷⁶⁹ where it is clear that an exception does not *ipso facto* 'call for a stricter interpretation'.

It appears to the present writer that ICSID's unaccountably different conclusions about the emergency status of the same period in Argentina in *CMS v. Argentina*, *LG&E v. Argentina* and *Enron v. Argentina* affirm Qureshi's argument that ICSID is not as seized

⁷⁶⁶ Ibid. p. 634.

⁷⁶⁷ Ibid.

⁷⁶⁸ Ibid.

⁷⁶⁹ *Vienna Convention on the Law of Treaties*, 1969.

of the mandatory nature of strict interpretation of exceptions as Bjorkland credits it with being. The pending annulment decision in *Enron Creditors Recovery Corp. & Ponderosa Assets, L.P. v. Argentine Republic*⁷⁷⁰ will provide an interesting insight into how ICSID resolves its problems with interpretation that these inconsistently decided cases betray.

8.1.5 The ICSID and its welfare deficit

The inescapable conclusion of a review of ICSID tribunals' decisions is that investors are in a position of command when ICSID is the arbiter. That is well and good, given that investor risk must be minimised for reason alone of making investment attractive. But no ICSID provision exists to minimise risk for host countries. It can be argued that there is no need for such provision, for all a host state need do is refrain from breaching the BIT. True though that is, it should also be taken into account that a state is one sort of entity under one administration, and another sort of entity under another administration. Rogue administrations are not unknown. (An obvious one was Russia under Boris Yeltsin and the depredations of its 'oligarchs'.) Yet the ICSID makes no allowance for a situation in which a rogue administration has brought in rogue investors, the host state's electoral system deposes that rogue administration, then attempts but fails to renegotiate its BITs with rogue investors. Instead, it seems that the BIT is above state-welfare considerations in the ICSID, or, more precisely, state-welfare considerations are not part of the ICSID vocabulary.

⁷⁷⁰ *Enron Creditors Recovery Corporation* (formerly Enron Corporation) and *Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3).

8.1.6 The ICSID and its democracy deficit

Equally worrying is that the ICSID Convention makes no rules as to what a state must do in order to become a valid host country to an investor. For instance, there is nothing like an ICSID provision that the intending host state must obtain its local parliament's consent to its becoming party to a BIT. Indeed, the ICSID assumption is that whatever the standing in a state of that state's current administration, that administration is sufficient to represent the state for BIT-concluding purposes. It might be argued that many states badly in need of investment do not have democratic forums of the 'parliament' kind, so they would not be able to satisfy such a 'broad-based consent' requisite if the ICSID were to have one. This would be a valid argument only when investment-capable states have government systems that are other than that of the democratic model (for instance, the UAEs'). Investment-capable stability will remain undisturbed in such states, for their administrations will remain undisturbed. However, where there is a democratic state, BITs concluded without a broad basis of consent are in peril, and so too is that state, for it risks discomfited investors' moves to recoup their investments, and therefore, considerable financial loss to itself.

More condemning still of a BIT without the broad-based consent of the host-state population is that it will work to upset international relations. It is not unusual for a state in dire need of foreign investment to fear that foreign investment will compromise its national integrity. The new (ex-Communist) EU member countries are a contemporary example of this: like the de-colonised countries of the early twentieth century, they crave self-determination, and consequently, fear economic colonisation. This became manifest in Hungary in late 2007: Israeli President Simon Peres addressed an Israeli economic

forum in Tel-Aviv on 10 October 2007. The Israeli Hebrew daily *Mááriv* published a transcript of it, and the Hungarian daily *Magyar Nemzet* translated and published it. In that address, Peres spoke of Israel's unprecedented economic growth in the aftermath of the 2006 War in Lebanon and the withdrawal from Gaza. Said Peres:

These days, it is possible to build an empire without colonies and armed struggle. Just look at the empire Bill Gates built himself without the aid of soldiers or police, and note its power. Faced with such power, governments are unable to exercise their own power. They have treasuries, but there is no money in them. Governments are therefore incapable of functioning productively. This, however, does not seal off businesses. Israeli businessmen are investing all over the world. Israel is experiencing unprecedented business successes. We have won our economic independence. We are buying up Manhattan, Poland and Hungary.⁷⁷¹

Magyar Nemzet put a boxed comment alongside this item to recall its interview in August 2007 of David Admon, then the Israeli ambassador in Hungary. That statement, *Magyar Nemzet* says, expressed satisfaction with the investment opportunities Hungary has to offer. Ambassador Admon added his opinion that Israeli entrepreneurs will balance their Hungarian partners:

Hungarians like to work, and they want payment for their work. Jews know how to be entrepreneurs, how to plan the business side of things, and how to make profit. Hence the Hungarian side says: 'Let me work, and you look after the economic backdrop.'

To the present writer's personal knowledge, the Hungarians are still talking about this article. It worried them, more than a little. They cite all manner of evidence around them that an Israeli occupation of Hungary's income-generating industries is alarmingly advanced. Many opine that Hungarians are merely workers in their foreign-owned economy. Some even express the fear that Hungary is to be the next Palestine.

⁷⁷¹ *Magyar Nemzet* Website, 'Kitűnő mutatók – Izrael felvásárolja Magyarországot?' [Great signs: Is Israel buying up Hungary?] 13 October 2007, <http://www.mno.hu/portal/522600>.

Demonstrations descended upon the Israeli Embassy in Budapest, and the Hungarian Prime Minister Ferenc Gyurcsany of the time faced yet another round of accusations that he is selling out⁷⁷² the Hungarian public. His party, the MSZP, the ruling party for eight years until the elections of 15 April 2010, was ousted from government, in large part because of its foreign investment policies, and now has a very reduced representation in parliament.

Whatever one makes of this situation, it is unavoidably true that a nation is at the mercy of its current government when it comes to a BIT. Often, BITs are not easily reversed, particularly those to do with investment in industries such as mining or other natural-resources-exploiting enterprises. Some African states are particularly vulnerable, especially those whose leaders are incompetent to negotiate BITs in their countries' best interests, or simply are not minded to do so.

At least in the case of Hungary, an EU member state, there is a mechanism that enables the EU Commission to investigate member states' BITS for consistency with EU law, and to bring them in line with that law: (i) The Commission will not allow BITs to sustain guarantees that conflict with EC Treaty powers reserved to the Council of the European Union under articles 57(2), 59, and 60(1); and (ii) the European Court of Justice (ECJ) considers an infringement of Article 307 any failure to adopt appropriate

⁷⁷² A BIT (dispute resolution forum ICSID) between Hungary and Israel came into force on 14 September 1992: *Agreement Between the Government of the Republic of Hungary and the Government of Israel for the Promotion and Reciprocal Protection of Investments*. It was terminated by Israel, the termination to be effective on 26 June 2007. Investments made while the BIT was in force will be hosted on the BIT-agreed basis for a period of 20 years after the date of termination: http://www2.pm.gov.hu/web/home.nsf/portalaricles/F51E7055D6C63CF1C12570110041AEB1?OpenDocument#_ftn1.

measures to eliminate the incompatibilities with the EC Treaty of the bilateral agreements entered into with third countries prior to accession of the Member State to the European Union. Both these points were established by two 2009 judgments of the ECJ.⁷⁷³ And although the EC Treaty is committed to the principle of free movement of capital, and Article 56 prohibits restrictions on the movement of capital between member states and third states, it also sets out exceptions to this principle. Article 59 grants the EC Council the power to restrict the movement of capital to or from third states when it considers that that movement might ‘cause or threaten to cause difficulties for the operation of the economic and monetary union. And Article 60(1) allows that restriction of movement made necessary for the implementation of foreign and security policy.

Far more pronounced antagonism towards ICSID-nominating BITs than Hungary’s is evident in Venezuela, Bolivia and Ecuador. This is a situation that has developed from an earlier enthusiasm of Latin American countries to become parties to the ICSID Convention. The first Latin American countries to join the Convention in the 1980s were Ecuador, Honduras, and El Salvador. During the 1990s, all Latin American countries followed suit, except Mexico, Brazil and Cuba. However, by 2007, something akin to a mass defection was occurring. Ecuador expelled the World Bank’s representative,⁷⁷⁴ Venezuela announced that it will be withdrawing from the World Bank and the IMF,⁷⁷⁵ and Bolivia, Nicaragua, and Venezuela announced their intention to withdraw from the

⁷⁷³ Case C-205/06, ECJ Grand Chamber, *Commission v Austria*, and Case C-249/06, *Commission v Sweden*, judgments of 3 March 2009.

⁷⁷⁴ Weitzman, Hal, ‘Ecuador expels World Bank envoy’, *Financial Times*, 27 April 2007.

⁷⁷⁵ Hudson, Saul, ‘Venezuela to quit IMF, World Bank’, *Reuters*, 30 April 2007.

ICSID.⁷⁷⁶ At the same time, Venezuela bought back the stocks in its biggest telecommunications and electricity firms, then nationalised them.⁷⁷⁷ The Venezuelan government asserted control over the country's oil industry, vowing that multinational firms would now be minority partners, or face expropriation.⁷⁷⁸ A little earlier, Bolivia took similar steps to regain control of its gas industry.⁷⁷⁹ On 18 August 2010, Ecuador's daily, *El Universo*, announced that the government of Ecuador has presented oil companies still operating in the country, most of them on contracts that nominate ICSID rules as the arbitration rules, with a new contract model to which it requires them to 'emigrate'. Among other things, the new contract model stipulates that dispute settlement between investors and the government will occur under UNCITRAL rules (Ecuador has cancelled its membership of the ICSID Convention⁷⁸⁰), and that the seat of arbitration will be The Hague, and Santiago de Chile the alternate venue. Furthermore, it is very likely that the National Assembly will denounce thirteen BITs with capital-exporting countries when parliament resumes after its current recess. The BITs to be denounced stipulate that dispute settlement is to occur under ICSID rules.⁷⁸¹

An intriguing situation is transpiring: the ICSID appears powerless to persuade some Latin American countries to pay the compensations it had awarded against them:

⁷⁷⁶ The Bretton Woods Project, 'Threats to withdraw from Bank's investment tribunal', 2 July 2007.

⁷⁷⁷ 'Venezuela buys 93 percent of electric company in nationalisation move', *Associated Press*, 10 May 2007.

⁷⁷⁸ 'Venezuela pulls control from Big Oil', *Reuters*, 1 May 2007.

⁷⁷⁹ *Ibid.*

⁷⁸⁰ Carbrera Diaz, Fernando, 'Ecuador continues exit from ICSID', *Investment Treaty News*, 8 June 2009, <http://www.investmenttreatynews.org/cms/news/archive/2009/06/05/ecuador-continues-exit-from-icsid.aspx>.

⁷⁸¹ 'Gobierno le pone fecha a petroleras para renegociar' [*The government presents oil companies with a renegotiation ultimatum*] <http://www.eluniverso.com/2010/08/18/1/1356/gobierno-le-pone-fecha-petroleras-renegociar.html?p=1356&m=1226>.

‘ICSID is currently handling \$12 billion worth of requests for arbitration over several disputes against Ecuador ... Argentina has not paid out the awards. US-based investors who are owed money are applying pressure on their own government to step up its demands that Argentina comply with the ICSID awards ...’⁷⁸²

Indeed, according to the ICSID itself, its only power of enforcement is the co-operative imposition of sanctions against the defaulting state by the World Bank and IMF:

Non-compliance by a State constitutes a violation by that State of its international obligations and will attract its own sanctions. The Committee refers in this connection ... to the consequences which such a violation would have for such a State’s reputation with private and public sources of international finance.⁷⁸³

But what if a group of countries is not dependent on World Bank or the IMF finance? On 9 December 2008, the presidents of Argentina, Bolivia, Brazil, Ecuador, Paraguay, Venezuela and Uruguay, signed the founding charter of the *Banco del Sur* (the Bank of the South) in Buenos Aires on 26 November 2007.⁷⁸⁴ This bank, planned to be a development bank, is to be totally independent of other international finance institutions, a factor that would decisively break the latter’s ability to direct their economies. It would also obviate ICSID tribunals’ ability to enforce their decisions. (But the Bretton Woods Project writers note perspicuously: ‘The question now is: what will be the counter-offensive of Bretton Woods institutions’⁷⁸⁵?)⁷⁸⁶

⁷⁸² The Bretton Woods Project, ‘ICSID in crisis: Straight-jacket or investment protection?’ 10 July 2009.

⁷⁸³ *Maritime International Nominees Establishment v. Republic of Guinea*, The Decision of the Ad Hoc Committee, 4 ICSID Rep. 54, 68-9 (1988).

⁷⁸⁴ ‘Bank of the South Formalized, Aims to Expand to \$20 Billion’, *Bloomberg*, 26 September 2009.

⁷⁸⁵ The World Bank and the IMF.

⁷⁸⁶ Romero, María José and Bedoya, Carlos Alonso, ‘The Bank of the South: the search for an alternative to IFIs’, The Bretton Woods Project, 26 September 2008.

8.2 The impact of BITs and the ICSID on Bangladesh, the UAE and Brazil

According to UNCTAD, Bangladesh and the UAE have both acceded to the ICSID Convention; Bangladesh has concluded 17 BITs,⁷⁸⁷ the UAE 10,⁷⁸⁸ and Brazil 8.⁷⁸⁹ But, according to ICSID, Brazil has concluded 15 BITs.⁷⁹⁰ Oddly enough, according to two journalists of *Investment Treaty News* (ITN) and the three lawyers they interviewed, Brazil has concluded no BITs.⁷⁹¹ It is impossible to account for this strange disparity in counting, other than in the terms that the cited ITN journalists suggest, at least with regard to Brazil:

... there is controversy in Brazil with respect to whether ratification of such agreements is prohibited under Brazilian law on grounds that it impedes the sovereign right of the state. However, others note that Brazil may lawfully, and in fact has previously consented to binding foreign arbitration by routinely entering into contracts that provide for such dispute resolution mechanisms.

In any case, there is full consensus on the fact that Brazil has not acceded to the ICSID Convention.

An ICSID tribunal declined jurisdiction⁷⁹² in one case brought against Bangladesh:

Scimitar Exploration Ltd v. People's Republic of Bangladesh (1993-94),⁷⁹³ it made an award in favour of the claimant in *Saipem S.p.A. v. The People's Republic of Bangladesh*

⁷⁸⁷ UNCTAD, 11 July 2008, <http://www.unctadxi.org/templates/DocSearch.aspx?id=779>.

⁷⁸⁸ UNCTAD, 11 July 2008, <http://www.unctadxi.org/templates/DocSearch.aspx?id=779>.

⁷⁸⁹ UNCTAD, 11 July 2008, <http://www.unctadxi.org/templates/DocSearch.aspx?id=779>.

⁷⁹⁰ ICSID, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ParticularCountry&country=ST167>.

⁷⁹¹ Whitsitt, Elizabeth and Vis-Dunbar, Damon, 'Investment Arbitration in Brazil: Yes or No?', 30 November 2008,

<http://www.investmenttreatynews.org/cms/news/archive/2008/11/30/investment-arbitration-in-brazil-yes-or-no.aspx>.

⁷⁹² ICSID, <http://icsid.worldbank.org/ICSID/FrontServlet>.

⁷⁹³ ICSID Case No. ARB/92/2.

(2007),⁷⁹⁴ and decided in favour of Bangladesh in *Chevron Block Twelve and Chevron Blocks Thirteen and Fourteen v. People's Republic of Bangladesh* (2006 – 2010).⁷⁹⁵ An ICSID tribunal made an award against the UAE in *Hussein Nuaman Soufraki v. United Arab Emirates*,⁷⁹⁶ then another ICSID tribunal annulled it. *Impregilo, S.p.A and Rizzani De Eccher S.p.A. v. United Arab Emirates*⁷⁹⁷ was commenced, then discontinued by the claimant. Brazil has no past or pending foreign-investment cases against it.

Of these three states, Bangladesh is clearly the most put-upon by BIT litigation. It is noteworthy that it is the only least-developed state among the three, and that it alone is experiencing a downturn in investor interest: UNCTAD's 2009 Foreign Investment Report notes that foreign direct investment in Bangladesh fell by 16 percent in 2007 from that of the previous year's level, despite the significant rise in both global and regional inflow levels, and rose only by 5.9 percent in 2008.⁷⁹⁸ For the same period, UNCTAD reports that with its inward investments of US\$ 35 billion, Brazil accounted for a large share of the rise in FDI in the region,⁷⁹⁹ and that more than four-fifths of 2008 FDI into West Asia was concentrated in three countries: Saudi Arabia, Turkey and the UAE, in that order.⁸⁰⁰

The juxtaposition of these facts cannot but insinuate the thought that BITs are dangerous for least-developed countries, and that they actually do not attract foreign investment.

⁷⁹⁴ ICSID Case No. ARB/05/7.

⁷⁹⁵ ICSID Case No. ARB/06/10.

⁷⁹⁶ ICSID Case No. ARB/02/7.

⁷⁹⁷ ICSID Case No. ARB/01/1.

⁷⁹⁸ http://www.unctad.org/sections/dite_dir/docs/wir09_fs_bd_en.pdf.

⁷⁹⁹ <http://www.unctad.org/Templates/webflyer.asp?docid=10504&intItemID=1465&lang=1>.

⁸⁰⁰ <http://www.unctad.org/Templates/webflyer.asp?docid=10508&intItemID=4697&lang=1>.

Certainly, Brazil's investment inflow is highly satisfactory, unlike that of Bangladesh, and Brazil is not in danger of international tribunals' awards against it on an investor's complaint, again unlike Bangladesh. The outcome is the better for Brazil and the worse for Bangladesh, and it is Bangladesh, not Brazil, that is the least-developed country. So what, then, is the World Bank doing by letting its ICSID arm work against the development of a least-developed state?

A trite argument goes like this: It is the fault of political instability in Bangladesh, not of the BITs or the ICSID, that this state is not attracting foreign investment, but instead, suffering under the weight of investor litigation against it. After all, the UAEs' ICSID accession and numerous BITs have not stemmed the vigorous flow of foreign investment into that state, nor is that state suffering from investor depredation *via* litigation. More to the point is that the ICSID Convention assumed the propriety of the equal treatment of the UAE and Bangladesh, notwithstanding the incomparably greater economic and infrastructure strength of the UAE: The ICSID is content to see investors make claims against Bangladesh in exactly the same way as they make claims against the UAE; investors need not fear that ICSID tribunals will take into consideration Bangladesh's economic fragility.

Little wonder, then, that Bangladesh is not, for the time being, overly interested in concluding new BITs. Naïve journalism of the following kind quite misunderstands Bangladesh's shying away from BITs:

The country's desperate needs were illustrated this week by violent protests in Dhaka over dire power shortages, the worst since the government, a coalition led

by the Bangladesh Nationalist Party (BNP), came to power almost five years ago. The economy has grown by more than a quarter since 2001, but power-generating capacity has not increased. The ruling coalition, which is due to step down on October 27th in favour of a caretaker government that will oversee elections in January, does not seem bothered. In recent months it has turned its back on more than \$4 billion in foreign investment—considerably more than the country's existing stock of foreign direct investment.⁸⁰¹

Bangladesh would do well to eschew BITs until such time as it has a carefully constructed legislative framework to accommodate them. Of course, Bangladesh could also go the Brazil way and do without BITs, especially ones that stipulate the ICSID as the dispute forum.

8.2.1 Foreign or local arbitration: the ‘binding’ factor

ICSID claims that its decisions are final, subject only to its own re-consideration and consequent annulment or validation. As professor Muchlinski notes, pursuant to its Articles 26 and 53, the ICSID puts itself above and beyond local investment law:

A most important feature of the ICSID Convention is its ‘delocalised’ system of dispute settlement operating independently and exclusively of domestic legal systems.⁸⁰²

Muchlinski continues:

... consent to ICSID arbitration will be excluded where the BIT ... contains a ‘fork-in-the-road’ clause and the investor has chosen domestic dispute settlement over ICSID arbitration. The selection made by the investor under the ‘fork-in-the-road’ clause will be decisive as the investor is free to waive his or her rights to international arbitration if he or she so wishes.⁸⁰³

⁸⁰¹ Editorial, ‘Economic nationalism in Bangladesh’, the *Economist*, 26 September 2008.

⁸⁰² Muchlinski, Peter, 2007, *Multinational Enterprises and the Law*, (2nd ed.) Oxford University Press, p. 719.

⁸⁰³ Ibid. p. 722.

The position is not as simple for the host state. Article 25(4) of ICSID allows the host state to notify it of the classes of dispute that is not willing to submit to ICSID arbitration. However, ICSID reserves the right to interpret the terms of the notification to determine whether it is in fact a notification in accordance with ICSID requirements. Many complications of interpretation ensue, and the outcome can be as it was in *Société Générale de Surveillance v. Republic of the Philippines*, where the ICSID tribunal decided that the matter at issue was not contractual and therefore beyond the jurisdiction of the local Philippine law.

The UAE has seen to it that its own local law concerning investment-related awards cannot be nearly as lightly set aside by an international court's interpretation inclinations. Furthermore, the UAE is itself in the process of setting up as an international arbitration centre. This is how it has reached this point:

In 2006, the UAE acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) of 1958. Prepared by the United Nations, the New York Convention:

... is widely recognized as a foundation instrument of international arbitration and requires courts of contracting States to give effect to an agreement to arbitrate when seized of an action in a matter covered by an arbitration agreement and also to recognize and enforce awards made in other States, subject to specific limited exceptions.⁸⁰⁴

⁸⁰⁴ UNCITRAL web site,
http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

In 2008, the UAE enacted its Arbitration Law of the Dubai International Financial Centre (DIFC), developed on UNCITRAL Model Law. On the estimate of Fulbright and Jaworski LLP, these two moves:

... ensured that that awards rendered in the UAE and the DIFC are automatically enforceable in over 140 other states, subject only to the minimal requirements of the Convention.⁸⁰⁵

This situation gives the UAE a level of safety in the ICSID ambit to which Bangladesh, and probably not even Brazil, could aspire: the DIFC judiciary 'are all prominent common law practitioners', among whom many are 'well-known arbitration practitioners'.⁸⁰⁶ From the point of view alone of the cost of having in place such a high-powered judiciary, this sort of legal self-insulation is well beyond the means not only of least developed countries but also of most developing countries. They are therefore left unprotected in the ICSID ambit.

8.3 Evolution of the WTO DSM

It is common ground that the goal of a dispute settlement mechanism (DSM) in a multi-lateral trade agreement such as the GATT and the WTO is the promotion of the efficient functioning of the global trading system by means of tariff-protection minimisation. Unlike the Investment DSM, which seeks to award compensation for financial loss, the Trade DSM seeks to rectify those conditions of trade in a jurisdiction that are not conducive to the efficient conduct of international trade. The difference, therefore, between the two sorts of DSMs is radical, at least in theory. Indeed, the Trade DSM began life on the idea that it lives in a diplomatic sphere of activity, not a legal one.

⁸⁰⁵ Fulbright and Jaworski, note 631, p.19.

⁸⁰⁶ Ibid. p. 20.

Several influential commentators maintain that that even in the presently legalistic WTO era, there remains ample room in the DSM for negotiation. Weiss, for instance, thinks that the DSM is properly concerned with the ‘balanced accommodation of interests, rather than a vindication of rights in a victory versus defeat pattern’, even if that results in a deficiency in legal consistency, predictability and certainty.⁸⁰⁷ John Jackson,⁸⁰⁸ though himself a firm proponent of the rule-oriented nature of the WTO,⁸⁰⁹ notes approvingly the persistence of the non-legalistic role of the DSM, as does Hudec.⁸¹⁰

This ‘diplomatic’ profile of the WTO DSM had its genesis in the original GATT, which came into effect in 1947, following the failure of the International Trade Organisation (negotiations. Itself a treaty and not an organization, the GATT established the basic principle of free trade in terms of the softening of tariff control before it was subsumed in the WTO with the creation of the latter upon the conclusion of the Uruguay Round of trade talks (1986 to 1994): The GATT Preamble says that its purpose is the ‘substantial reduction of tariffs and other trade barriers and the elimination of preferences, on a reciprocal and mutually advantageous basis’.

As Hudec puts it, the original GATT had a decidedly loose compliance mechanism in which the signatories ‘simply gave themselves the power to make whatever decisions were necessary to implement the agreement’.⁸¹¹ The GATT ‘diplomatic’ style remained

⁸⁰⁷ White, Eric L, 2000, ‘Written and Oral Submissions in WTO Dispute Settlement’, in *Improving WTO Dispute Settlement Procedures*, Weiss, F (ed.), Cameron May, pp. 121-33.

⁸⁰⁸ Jackson, John, 1998, ‘Dispute Settlement in the WTO: Policy and Jurisprudential Considerations’, Research Seminar in International Economics Discussion Paper 419, University of Michigan School of Public Policy, pp. 1 -2.

⁸⁰⁹ Ramli, note 376, p. 104.

⁸¹⁰ Hudec, Robert, 1999, *Essays on the Nature of International Trade Law*, Cameron May, p. 17.

⁸¹¹ *Ibid.* p. 6.

in place until the late 1960s, and saw only one complaint from a signatory state between 1963 – 1969.⁸¹² However, the Tokyo Round (1973 - 1979) produced two documents: the Agreed Description of Customary Practice and the Understanding on Dispute Settlement, that enlivened an interest in the filing of complaints and requests for the formation of panels. These two documents made it harder for signatories to drag their feet with regard to implementing panel recommendations, and indeed, with regard to consenting to the formation of panels.⁸¹³

The Uruguay Agreement finished this job. The Final Act Embodying the Results of the Uruguay Round (1986 – 1993), signed on 15 April 1994 in Marrakech, describes the DSM of the Final Act and its relation to that of GATT thus:

Disputes in the WTO are essentially about broken promises. WTO members have agreed that if they believe fellow-members are violating trade rules, they will use the multilateral system of settling disputes instead of taking action unilaterally. That means abiding by the agreed procedures, and respecting judgments ...⁸¹⁴

The same source adds that since the Uruguay Round, it has become impossible for a ‘losing’ state to block the adoption of a ruling. Under the previous GATT procedure, rulings could only be adopted by consensus, meaning that a single objection could block the ruling. Now, rulings are automatically adopted unless there is a consensus to reject a ruling—any country wanting to block a ruling has to persuade all other WTO members (including its adversary in the case) to share its view.

⁸¹² Ibid. pp. 12 - 13.

⁸¹³ Ibid.

⁸¹⁴ ‘Understanding the WTO: Settling Disputes: A unique contribution’, http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm.

Clearly, with the Uruguay Round, the diplomatic GATT DSM gave way to the legalistic WTO DSM. But just how ‘legalistic’ can a DSM be that does not have the coercive authority of a conventional court of law? Or, to put it another way, is the Trade DSM necessarily such that it must retain its footing in international diplomacy? As the following discussion will demonstrate, only the affirmative answer is available.

8.3.1 The legal basis of the WTO DSM

The document that lays out the legal underpinnings of the WTO DSM is the *Understanding of Rules and Procedures Governing the Settlement of Disputes* (the DSU), Annex 2 of the WTO Agreement. Its key provisions are: Article 21(3) that provides for the vacating of its violating position by the member state found to be so violating; Article 22(1) provides for negotiations about the appropriate compensation of member states affected by the non-vacated violation; Article 22(2) provides for the withdrawal by affected member states from the violating member state of ‘substantially equivalent’ concessions. Specific Articles deal with the formation of the panel in the event that a panel is requested on the breakdown of pre-litigation consultations between parties (Articles 6 – 8). The rest is, so to speak, procedural, with Article 2 creating the Dispute Settlement Body (DSB) that is responsible to appointing panels and the permanent Appellate Body (AB).

Articles 21(3), 22(1) and 22(2) are here dubbed the ‘key provisions’ because they together, and only they, establish the legal clout of the WTO DSM. Otherwise, the WTO is forced back onto its ‘international diplomacy’ foot, for reason of certain GATT

provisions themselves. For instance, the re-negotiation of tariffs under GATT Articles XXVIII and XXVIII *bis* is subject to the requirement those re-negotiations ‘maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for in [the] agreement prior to such negotiations’. Also, as Bagwell and Staiger note:

Also, as the creation of GATT and its Article XXII and nullification and impairment procedures of Article XXIII may be interpreted as an attempt to move from a non-cooperative to a cooperative equilibrium outcome, by limiting the use of retaliation along the equilibrium path and repositioning retaliation as an off-equilibrium path threat that enforces co-operative equilibrium path rules.⁸¹⁵

Furthermore, GATT Article XIX (often known as the ‘escape clause’ but which might as well be known as the ‘licensed breach’ clause) allows a member country to raise tariffs on an import when increased competition from imports of the same commodity threaten domestic industry. In view of these GATT provisions and the DSM that accommodates them, the insight Sykes voices is compelling:

The WTO’s DSM calibrates retaliation for breach to the [expectation damages] of the aggrieved party and eschews more severe sanctions that might be aimed at forcing compliance . . . although the system seems to prefer compliance in certain respects, it carefully preserves a non-compliance option with a penalty akin to expectation damages.⁸¹⁶

In other words, it appears that built into both the GATT and the WTO DSM is a tolerance of breach, on the apparent understanding that not all breach is always injurious to other member states. This is *realpolitik*, not law, and therefore, the stuff of diplomacy, not of

⁸¹⁵ Bagwell, Kyle and Staiger, Robert, 2002, *The Economics of the World Trading System*, MIT Press, p.96.

⁸¹⁶ Sykes, Alan O, 2000, ‘The Remedy for Breach of Obligations Under the Dispute Settlement Understanding: Damages or Specific Performance’, in Bronckers, M and Quick, R (eds) *New Directions in International Economic Law*, Kluwer Law International, p. 97.

law. What remains unclear, however, is how the WTO DSM works to realise the second and third Preamble with regard to development:

Recognizing further that there is a need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth of international trade commensurate with the needs of their economic development,

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the eliminations of discriminatory treatment in international trade relations ...⁸¹⁷

8.3.2 The WTO Special and Differential Treatment commitments

The horse-trading with tariffs (described above) that the GATT approves is well and good for being a feature of that Agreement's flexibility. It is consistent also with the WTO provisions for the special and differential treatment (SDT) of developing, least-developed, land-locked and net-food-importing countries, as well as those with small and vulnerable economies. But have the WTO DSM judiciary bodies ever implemented the SDT provisions in these countries' interest?

Both Qureshi⁸¹⁸ and Roessler⁸¹⁹ have argued that they have not, Qureshi noting that SDT provisions in the WTO system are merely hortatory, and both remarking that these provisions are mere procedural ones that do not overcome the inherent differences between developing and developed states' access to fair arbitration. Nevertheless, it is

⁸¹⁷ Preamble, Marrakesh Agreement Establishing the World Trade Organization, http://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_01_e.htm.

⁸¹⁸ Qureshi, AH, 'Interpreting World Trade Organization Agreements for the Development Objective', vol. 37, issue 5, *Journal of World Trade*, 2003, p.864.

⁸¹⁹ Roessler, note 314, p. 90.

true that at least at three points, the DSU makes special provisions for developing countries:

(i) Article 3(12) enables a developing-country complainant to invoke against a developed country the Decision of 5 April 1966⁸²⁰ as an alternative to the DSU provisions concerning the DSM's consultation phase. (There has not yet been an instance of such an evocation.)

(ii) Article 4(10) exhorts that during the consultation phase, developing countries' interests should be recognised: '... members should give special attention to the particular problems and interests of developing country Members ...'.

(iii) Article 12(11) requires the reporting panel to give an account of the form in which the relevant WTO provisions concerning the differential and more favourable treatment of developing country have been observed.

Alavi⁸²¹ has dismissed all three of these provisions as essentially ineffectual, for none takes the least interest in the consequences of a Panel's ruling, or, for that matter, of the Appellate Body's ruling. This is a persuasive perspective, for reason alone of the lack of a panel or AB ruling to challenge it. The best that can be said of this developing-nation-regarding provisions of the DSU is that they at least exist, which is more than can be said of the dispute-settlement mechanism of the ICSID.

⁸²⁰ Decision of 5 April 1966 on procedures under Article XXIII, BISD 14S/18.

⁸²¹ Alavi, A, 'On the (Non-)Effectiveness of the WTO's Special and Differential Treatments in the Dispute Settlement Process', vol. 41, issue 2, *Journal of World Trade* 2007, p.136.

8.4 The radical concept and the attendant risk to least-developed countries

‘Non-discrimination’, ‘equal treatment’, ‘national treatment’ and ‘most favoured nation’ treatment are the terms of the variety of WTO Charter and bi-lateral treaties upon which disputes are brought to the WTO DSM. These are also the terms upon which BITs are brought before their various dispute-settlement bodies. All these terms refer to exactly the same principled guarantee that contracting nations seek from one another: that all contracting parties undertake not to discriminate against another contracting party on the ground of nationality. Oddly, though, the principle serves a quite different purpose in the trade context than it does in the foreign investment context. DiMascio and Pauwelyn summarise the difference thus:

... trade law’s focus on market access and liberalisation centres national treatment in the GATT/WTO on efficiency concerns: protecting tariff commitments against circumvention and ensuring equal competitive opportunities to imported products. In contrast, investment law’s focus on protecting individual investors in order to attract more FDI, especially to developing countries, focuses national treatment on providing security and fairness to individual business operations by curtailing discriminatory abuse by local governments.⁸²²

These authors cite as their authority the words of the tribunal presiding over a dispute regarding the US - Egypt BIT:

The purpose of [national treatment in the Us – Egypt BIT] is to promote foreign investment and to guarantee the foreign investor that his investment will not because of his foreign nationality be accorded a treatment less favourable than that accorded to others in like positions.⁸²³

⁸²² DiMasci, Paul, and Pauwelyn, Joost, ‘Non-discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?’, vol. 102, no. 1, *American Journal of International Law*, 2008, p. 69.

⁸²³ *Champion Trading Company v. Arab Republic of Egypt*, ICSID case No. ARB/02/9. para. 126.

Differences of purpose aside, these terms are legally problematic: The non-discrimination principle that subsumes 'equal treatment' is a fuzzy principle that has no absolute sense, thence no unequivocal application.

The BITs and trade agreements can intersect, for the investor is sometimes also a trader who can turn a trade dispute into an investment dispute. Also, a national government that enters a BIT might well be seen by the people of that nation to have acted contrary to the national interest. This capacity of BITs, both to hijack trade agreements and to facilitate threat to the national interest, is in fact quite sinister. The latter capacity is difficult to identify at dispute-hearing stage, for the WTO DSU is a body that deals with trade law, and, quite properly, not with politics. Indeed, it is difficult to identify it at any stage, because some BITs are concluded in secret between investing governments and host governments. No pertinent law prohibits such secrecy.

It might at first seem that it is only investment law, not trade law, that suffers from the problems inherent in the non-discrimination principle. The view is reasonable, for trade law is comparatively well settled. Investment law is not multilateral law like trade law, but bilateral, and its jurisprudence relies on customary international law. There is in this a potential promise that the twain might never meet. That promise, however, is empty, for, as Hamilton et al.⁸²⁴ and Verhoorsel⁸²⁵ point out, private investors have discovered that trade disputes can be converted into the much more lucrative investment disputes.

⁸²⁴ Hamilton, CA and Rochwerger, Paula, 'Trade and Investment: Foreign Direct Investment Through Bilateral and Multilateral Treaties', vol.18, no.1, *New York International Law Review*, 2005, pp. 36-38.

⁸²⁵ Verhoorsel, Gaetan, 'The Use of Investor-State Arbitration Under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law', vol. 6, *Journal of International Economic Law*, 2003, pp. 493-496.

Chiefly responsible for this intersection of trade and investment law is Article 12(c) of the GATS, whereby ‘trades in services’ is defined to include ‘the commercial presence in the territory of any other member’, which brings foreign direct investment in the services industry into the trade sector. In turn, chiefly responsible for international investors’ preference for a dedicated investment arbitration forum above the WTO DSM is that the latter does not offer the investor compensation for damage that a host state might have inflicted on the investor. Instead, it offers the opportunity for the investor to have the host state correct the WTO breach of which the host state may be found guilty. Also, though investment treaties are concluded between states, the natural-or-juridical-person investor may bring a charge against the host state to an investment dispute forum, whereas only a state may bring a charge to a WTO forum.

This is the point at which ‘non-discrimination’, even in its broad sense of ‘fair and equitable treatment’, serves investors well and contains serious risk for developing-country hosts. Professor Muchlinski adds his authority to the view that the ‘concept of fair and equitable treatment is not precisely defined’, such that it remains ‘a concept that depends on the interpretation of specific facts for its content’.⁸²⁶ A well-heeled multinational investor claiming compensation against a least-developed host state is well placed to successfully demonstrate to an international investment tribunal a breach of the ‘fair and equitable treatment’ of itself. Effectively, everything rides on that tribunal’s inclination to protect the least-developed host state or the investor.

⁸²⁶ Muchlinski, note 802, p.625.

8.5 Conclusion

Having outlined the nature of the two systems of dispute resolution, that which deals with foreign investment dispute and that which deals with trade disputes, it is impossible to avoid the conclusion that its shortcomings notwithstanding, the WTO's multilateral agreement provides by the far more fair DSM. Central to the WTO DSM's concern is the correction of local conditions that are not compliant with the provisions of the several WTO agreements. The BITs on the other hand, especially when their agreed forum is the ICSID, are totally compensation oriented. That cannot but pose huge risk for host countries, especially the least developed ones, as the Bangladeshi example demonstrated. Nevertheless, comparatively benign though the WTO DSM is, uncertainty concerning the interpretation of the 'non-discrimination' continues to pervade WTO panel decisions. It would seem, in view of the remarks of Professors Muchlinski and Maniruzzaman on the legal application of this concept, that the uncertainty is a chronic condition. This really does not matter hugely in the WTO context, for investment disputes are all but absent there. It does, however, matter in the ICSID context, for investment host countries are left wide open to the interpretative inclinations of its tribunals. All in all, it is wise of least developed countries, and even developing countries, to take the Brazilian example and refrain from concluding BITs, particular those that commit them to ICSID contracts.

Chapter 9 will conclude this thesis with a summary of the findings of this thesis and of the answers it provided to the research questions, and an outline of issues not anticipated by the research questions. It will describe the nature of the new climate law, and of the

international distributive justice principle. A submission of the adequacy of the thesis standard is tendered.

Chapter 9

Conclusion

9.0 Summary of findings

Developing countries express a number of concerns about the WTO legislative regime, all of them to do with the disadvantageous circumstances it creates for them with regard to their prospects of economic development through trade. Where there is disadvantage for some WTO members, there is also an absence of justice and fairness to those members. That absence is in itself an indictment of the WTO legislative regime, and it frustrates its reason-for-being. This situation is, however, remediable with the introduction into the WTO legal regime of the principle of international distributive justice. This thesis proposed a new climate law as an end in itself, and as an illustration of the practicability of introducing this principle as a fundamental principle of the WTO. It was noted that the principle of international distributive justice is thoroughly compatible with the GATT, and with the WTO Agreements, and that it is only for the purposes of the new climate law, which must regulate the activities of non-state entities responsible for high GHG emissions, that UN intervention is needed. BITS that enforce investor/host-state contracts that discourage the host state's implementation of environment-protecting policies can be controlled by the new climate law, but host states remain vulnerable to contracts that leave them open to substantial fines in forums such as ICSID tribunals.

9.1 The research questions

Seven questions⁸²⁷ identified the answers that the research pursuits of this thesis demand.

The first them – ‘To what extent is it true that WTO accession imposes a greater burden on developing countries than it imposes on developed countries?’ – was answered thus: There is a greater burden on developing countries because many of them have legal systems that are unlike the developed countries’, and the WTO legal regime is far more closely similar to that of the latter than of the former. That burden, however, is not equal across the ‘developed countries’ spectrum. India and Brazil, for instance, given their parliamentary democracy styles of law, are at far less disadvantage than China and the UAE, neither of which are parliamentary democracies.

As *China–Auto Parts*⁸²⁸ established, under the Dispute Settlement Understanding, ‘WTO-plus’ commitments of late-entry countries are enforceable like the provisions of WTO Agreements.⁸²⁹ Given that no developed countries were late accessions to the WTO system, the WTO-plus impositions have worked only against the interests of developing countries.

The second question – ‘What feats of local law reform did the case-study countries, the UAE, Brazil and Bangladesh, have to perform to enable their accession to the WTO?’ – was answered largely with reference to the TRIMs and the TRIPs and GATS.

⁸²⁷ See 1.5 of this thesis.

⁸²⁸ note 691.

⁸²⁹ This point is referred to at 7.3.1 of this thesis, with regard to GATT Article XI(1) prohibition of the maintenance of quantitative restriction measures and permission to maintain ‘duties, taxes or other charges’. Despite this, China was required by established member states to eliminate specific export taxes.

The UAE acceded to the WTO in 1996. By 2006, its law was almost fully WTO-compliant, but for the limits it imposes on foreign equity participation, and for the absence in it of competition legislation. Also, the country's Agency law is not fully GATS-compliant, for it still offers preferential treatment to GCC countries as part of a Regional Trade Agreement. Although this is potentially actionable, no DSB action has been taken against the country, nor is there the prospect of such action. Perhaps its most onerous feat was the enabling of its international banking activities in a manner that is Sharia'h-compatible.⁸³⁰ To boot, its compulsory-licensing of pharmaceutical products provisions is also not yet fully complaint.⁸³¹ This, however, has incurred no DSB action, presumably because this country does not have a generic-medicines reproducing industry, and is otherwise a good client of the pharmaceutical companies of developed states.

Brazil introduced its *Industrial Property Law* as early as 1996, anticipating large R&D activity, and the consequent expansion of its patents and pharmaceutical industry. It was very quick to become fully TRIPs-compliant.⁸³²

Bangladesh acceded to the WTO in 1995, and saw its major industry's, the RMG's, international market base all but destroyed by the expiry of the MFA in 2005 and the coming into force of the ATC. Helpless in this context, this country suffered the legal barrier to market participation that the ATC imposed, rescuing its RMG sector only with the aid of an IMF loan.⁸³³ This country does have a patent law, but it addresses only the

⁸³⁰ See section 3.3 - 3.3.2 of this thesis.

⁸³¹ See section 4.6 of this thesis.

⁸³² See section 3.4 of this thesis.

⁸³³ See section 3.5 - 3.5.1 of this thesis.

process of producing pharmaceutical products, not the patenting of products. Also, although it reproduces generic medicines, it does so without a compulsory licensing permit, for its Patents and Designs Act 1911 has to be amended before it can give effect to the TRIPS compulsory licence provisions. The country, being a least-developed country, is absolved from the need to become TRIPS-compliant until 2016, but it has developed its Draft Patent Act 2007.⁸³⁴ Its *Drug (Control) Ordinance* 1982 is also not TRIPS-compliant.

The answer to the third question – In what ways were the accession challenges that faced the UAE and Bangladesh different from those faced by developing countries such as Brazil, where economic and legal infrastructures were closely approximate to developed, Western-world ones? – was partially provided in answer to the first question. It has to be added that the UAE, a well-financed country, was able to avail itself of legal expertise that oversaw the overhauling of its legal system to achieve WTO compatibility. No small feat in this endeavour was the obligation to ensure that the quest for WTO compatibility remained consistent with Sharia'h. The UAE is politically stable, so the body politic abetted rather than hindered accession tasks. This was not so in Bangladesh, where the long absence of a stable government was a problem. This country's being a parliamentary democracy was therefore not of avail to it for accession purposes. To date, it has not achieved full WTO compatibility, but, being a least-developed country, it has until 2016 to do so. However, Bangladesh does not have the incentive that Brazil had for becoming, for instance, TRIPS-compliant in order to protect its own patents and develop its

⁸³⁴ See section 4.6 of this thesis.

pharmaceutical industry. Nor does it have the UAE's incentive to become TRIMs compatible in order to develop its investment sector.

The unavoidable answer to the fourth question – ‘Which are the specific provisions of the WTO legal framework, particularly of the TRIPs, TRIMs and GATS agreements, that constitute legal barriers to trade for developing countries?’ – is that it is not only the case that some provision of the Agreements constitute barriers to trade for developing countries, but also that the Agreements are such that they foist obligations on developing countries that hinder the development by the poorest (least-developed) of them of trade capacities and wealth-producing capabilities, while failing to protect them from extra-WTO Agreements, or FTAs, that harm their potential trading strengths:

The TRIPs compulsory licensing provision is set since 2005 to reduce India's trade in the export of generic medicines.⁸³⁵ Furthermore, extra-TRIPs conditions inhibit the use by China of compulsory licensing,⁸³⁶ and no Agreement protects it or any other developing member against these conditions. Similarly, Bangladesh, in quest of investors and market access, has signed two bilateral ‘TRIPs-plus’ agreements⁸³⁷ to afford higher than necessary protection to patent pharmaceuticals. Although at the moment Bangladesh is nearly self-sufficient in pharmaceuticals, and is exporting to 72 countries in Asia, Africa and Europe, enforced TRIPs compliance in 2016 is likely to set this trade capacity back substantively.

⁸³⁵ See section 2.3 of this thesis.

⁸³⁶ See section 4.4 - 4.5 of this thesis.

⁸³⁷ See section 4.6 of this thesis.

Attempts by developing nations to develop a domestic automotive industry are thwarted by the TRIMs, a fact that Indonesia experienced⁸³⁸ in the decision in the case *Certain Measures Affecting the Automobile Industry*.⁸³⁹ Its justification of the imposition of import taxes and duties on foreign automobiles and parts was disallowed by the DBS Panel. India had a similar experience, as did the Philippines.⁸⁴⁰ Notably, the complainants in all these cases were developed countries.

With regard to the GATS, para. 34 of the Doha Declaration placed an unequivocal ban on the taxation of digital products transmitted as e-commerce,⁸⁴¹ regardless of the fact that their taxation is often a major revenue source of least-developed countries, and that its banning reduces those countries' wealth-generating capacities. Yet it is also true that India finds particularly good trade-stimulating mileage in the GATS, as do the UAE and Brazil.⁸⁴² China, however, is threatened by the need to further open its banking sector,⁸⁴³ particularly in this time of international banking crises, for fear of US and EU retaliation if it does not.

Of considerable importance in the answer to the fourth question is the fact that no Agreement makes the SDT of developing countries an obligation of developed countries. Although MFN and NT provisions, notably of TRIPs Article 4, allow member states to give developing countries special conditions of access to their markets, they leave that

⁸³⁸ See section 5.3 of this thesis.

⁸³⁹ note 451.

⁸⁴⁰ See section 5.3 of this thesis.

⁸⁴¹ See section 6.1 of this thesis.

⁸⁴² See section 6.4.1 -6.4.3 of this thesis.

⁸⁴³ See section 6.4.5 of this thesis.

giving on a voluntary basis.⁸⁴⁴ No WTO provision therefore exists to give developing countries quarter in market access on the basis of their less competitive powers.

Amrita Narlikar provided⁸⁴⁵ the bulk of the answer to the fifth question: ‘How is the legal framework of the DSM biased against developing countries, and what challenges does this bias create for them?’ She accuses that in the DSM, equality of status is thrust upon clearly unequal member states. This, she says, assures a procedural fairness, but fails even to take into account the need to deliver fairness of outcome. The present thesis writer added that her point is vindicated in that, despite Article 15 of the Antidumping Agreement, which imposes an obligation on developed country to ‘actively undertake an exploration of possibilities with a willingness to reach a positive outcome’, the Panel in the *EC – Bed Linen* case⁸⁴⁶ decided that no ‘outcome’ is contemplated by this provision, but merely an obligation to observe certain procedures in quest of an outcome that would be beneficial to the developing-country party to a dispute. The obvious challenge here is that the DSM is not concerned to disallow outcomes of disputes that harm the development of developing countries.

The DSM’s legal structure is based on Western legal concepts, and is therefore not a familiar procedure of dispute resolution to the non-Western developing states. This is one of the reasons attributed to the low frequency of their appearances before the DSB, particularly of least-developed countries.⁸⁴⁷ Brazil’s recent DSM victory in the *US–*

⁸⁴⁴ See section 2.5.1 of this thesis.

⁸⁴⁵ See section 2.4 of this thesis.

⁸⁴⁶ Ibid.

⁸⁴⁷ See section 2.1.6 of this thesis.

Upland Cotton case,⁸⁴⁸ in which it gained permission to cross-retaliate against the United States,⁸⁴⁹ may well alter this situation.

The cost of DSM proceedings is high, and often prohibitive for developing countries. In any case, even in the event of an outcome in its favour, a developing country reaps no benefit unless it is in a position to retaliate against the developed-country opponent. More often than not, this is not the case. (Brazil's situation is exceptional, for it has the requisite means of retaliation.)

Alavi⁸⁵⁰ has pointed out the egregious failure of the DSB to give effect to SDT provisions. Despite the enabling by Article 10 of the DSU of third-party joining of a complaint before the DSB, and despite the availability of WTO law (Articles 21.2 and 21.2 of the DSE and Article 7 of the SCM Agreement) to enable the SDT of least-developed countries in this context, both the Panel and the Appellate body decided to turn away Chad and Benin, both least-developed countries, as third parties to the *Uplands Cotton* case whose industries suffered 'the serious prejudice' as a result of the US subsidy.⁸⁵¹

The answer to the sixth question – 'Which provisions of the WTO agreement, and of the TRIPs, TRIMs, GATS agreements and of the DSM framework, might be revised with a view to addressing the concerns of developing countries?' – is simple: No revision of

⁸⁴⁸ note 41.

⁸⁴⁹ See 2.1.6 and 6.4.3 of this thesis.

⁸⁵⁰ note 303.

⁸⁵¹ See section 3.8 - 3.8.1 of this thesis.

Agreements will settle the concerns of developing countries. Instead, developing countries (identified according to the revised definition of ‘developing countries’⁸⁵²) have to be absolved of the obligations that WTO Agreements impose, in accordance with one objective criterion: their respective GDP statuses. That absolution serves not only to remove impediments to their economic development, but also protects them against suits in the DSM. Comparing the effects of WTO Agreements on the UAE, Brazil and Bangladesh, it is blatantly obvious that they support development in developing countries only when those countries have a sufficiency of resources to render them trade capable.⁸⁵³ Yet, it was pointed out, the facilitation of development is a UN obligation,⁸⁵⁴ and it was conjectured that hostility from the TCC to this obligation is responsible for the failure of WTO Agreements to meet this obligation.⁸⁵⁵

The seventh question – ‘Can the problems of developing countries be reduced significantly upon the introduction into the WTO legal scheme of the international distributive justice principle in the form that this thesis proposes it?’ – is already answered in the sixth question. It should be added to that answer that a law of obligations, which WTO Agreements constitute, appropriately distributes obligations. Distributed according to capacity discernible in GDP status, obligations are not incapacitating burdens. As things are in the WTO regime, obligations are not distributed. This means that all member countries are equally burdened with them. Even the SDT principle does

⁸⁵² See section 3.2 of this thesis.

⁸⁵³ See section 3.6 of this thesis.

⁸⁵⁴ See section 3.6.1 of this thesis.

⁸⁵⁵ See section 3.8.3 of this thesis.

not work in this system to ameliorate them.⁸⁵⁶ With the introduction of the international distributive justice principle, the WTO *erga omnes partes* obligations would be ameliorated, such that they would affect the *partes* only in the measure that each can bear effects. That is not only pragmatic, but also just.

9.2 Beyond the research questions

The research questions did not anticipate the conclusion that the concept ‘developing country’ that is operative in the WTO legal regime is radically flawed. It was nevertheless observed that this is the case, and that a new definition of this concept must be made operative in the WTO framework. It was recommended that self-designation as ‘developing country’, which is a drastic departure from the GATT definition,⁸⁵⁷ be abandoned, and that ‘developing country’ status be determined on a rank ordering of countries on their GDP status. A suggestion was that on this ordering, all countries below a GDP of US\$10,000 be designated ‘least-developed countries’, those between US\$10,000-19,000 the ‘developing countries’, and those above the ‘developed countries’.⁸⁵⁸ This is the essential mechanism of the introduction into the WTO legal regime of the international distributive justice principle.

Also not anticipated by the research questions is the threat to economic development that emanates outside the rigours of the WTO regime, that is, from BITs that entail host-nation commitments to extra-WTO jurisdictions such as that of ICSID tribunals. Chapter 8 noted that despite the fact that GATS Article I(2)(c) brings international foreign

⁸⁵⁶ See setion 3.8 and section 7.3.2 of this thesis.

⁸⁵⁷ See section 3.1.1 of this thesis.

⁸⁵⁸ See section 3.2 of this thesis.

investors into WTO jurisdiction, FDI-related disputes are arbitrated outside the DSM, in tribunals such as that of ICSID, since the proliferation of BITs that nominate these tribunals as the dispute-settlement forums. The welfare deficit of ICSID Tribunals is noted,⁸⁵⁹ as is the democracy deficit of the BITs system.⁸⁶⁰ Also noted is that despite the ICSID's being an arm of the World Bank, an institution of which the reason-for-being is development, Bangladesh, a least-developed country, has found itself heavily burdened with foreign-investment dispute suits and short of adequate FDI.⁸⁶¹

9.2.1 The new climate law

Research was already well advanced before the failure of the Copenhagen Conference on climate change in late 2009. But it was only then that the parity between (i) the international distributive justice principle that this thesis recommends for inclusion in the WTO legal regime, and (ii) the UNFCCC's 'common but differential responsibilities' principle became apparent to this thesis writer, and gave rise to the idea of devising a new climate law for the WTO context.

The basis of the new climate law is the observed parity between (i) the principle, 'common but differential responsibilities', that has emerged as the dominant principle of MEAs and (ii) the international distributive justice principle that distributes obligations. Where the parity is not perfect, e.g., when the UNFCCC/Kyoto Protocol seeks to pursue retributive or re-distributive justice, those provisions are recommended for elimination on

⁸⁵⁹ See section 8.1.5 of this thesis.

⁸⁶⁰ See section 8.1.6 of this thesis.

⁸⁶¹ See section 8.2 of this thesis.

the basis that international distributive justice is neither retributive nor redistributive.⁸⁶² It is observed also that BATs imposed pursuant to the GATT Article XX chapeau, inasmuch as they are expressions of the moral positions of the imposing member states on the matter of the preservation of human and animal health and life and the environment, cannot be curtailed by the international distributive justice principle because that principle does not arbitrate moral positions.⁸⁶³ It was noted, however, that whereas the new climate law based on the international distributive justice principle can readily become a WTO law, the WTO is without the jurisdiction necessary to regulate the activities on non-state entities such as oil and gas-extracting multinational companies – the very entities that are the most prolific emitters of GHGs. It was therefore urged that UN intervention in the construction of the new climate law is essential.⁸⁶⁴

Also essential is the removal of the carbon-credits market from the private sector, for evidence demonstrates that it exists to enable investors in it to avoid the reduction made obligatory upon states of installations' GHG emissions.⁸⁶⁵ It was therefore recommended that the new climate law impose an export tax on all carbon credits. This is a move consistent with GATT Article XI(1), which prohibits the maintenance of quantitative restriction measures but allows their maintenance as 'duties, taxes or other charges'.⁸⁶⁶

⁸⁶² See section 7.1 of this thesis.

⁸⁶³ See section 7.1.2 of this thesis.

⁸⁶⁴ See section 7.4 of this thesis.

⁸⁶⁵ See section 7.3 of this thesis.

⁸⁶⁶ See section 7.3.1 (final argument) of this thesis.

9.3 The nature of the international distributive justice principle

The international distributive justice principle was abstracted selectively from the importation, by Frank Garcia and Thomas Pogge, into the international realm of the distributive justice principle, of which the progenitor is John Rawls.⁸⁶⁷

Rawls's 'differences' principle, on which social institutions must be designed to confer maximum benefit on the least socially and economically privileged, is the first core component of the international distributive justice thesis that the present thesis writer propounds. The second core component of this thesis is the need for the re-definition of 'developing countries' such that this status is conferred according to the rank-ordering of all member states on the objective criterion of GDP status.⁸⁶⁸ The third core component is the activation of the 'differences' principle by the distribution of WTO Agreements-regarding obligations of member states on a nil-to-absolute basis, such that 'nil' obligation accrues to least-developed states, reduced obligation to developing states, and 'absolute' obligation to developed countries.⁸⁶⁹ The fourth core component is that only obligations are distributable; goods are not distributable on this principle, for WTO law is a law of obligations,⁸⁷⁰ not of property rights.⁸⁷¹ The criterion of distribution of obligations is always objective (e.g. GDP status: see above) on this principle, and cannot by nature lend itself to arbitrating rival moral positions.⁸⁷²

⁸⁶⁷ See section 2.3.2 - 2.3.3 of this thesis.

⁸⁶⁸ See section 3.2 of this thesis.

⁸⁶⁹ Ibid.

⁸⁷⁰ See section 3.7.5 and section 7.1.1 of this thesis.

⁸⁷¹ See section 3.7.2 of this thesis.

⁸⁷² See section 7.1.1 - 7.1.2 of this thesis.

It might be posited that the ‘objectivity’ of criteria is not readily decidable, and that this is a weakness of the proposal by this thesis of the international distributive justice principle.

This thesis writer distances this criticism with the further proposal that objectivity is not as allusive as this criticism suggests: It is sufficient that a criterion be free of judgment as to entitlement, and of judgment as to moral or ethical worth, for it to be objective.

Objective criteria, for the purposes of international distributive justice, are selected from pertinent data-in-the-world, and applied to achieve an end. In this case, the ‘end’ is the sustainable distribution of obligations imposed by WTO Agreements.

The new climate law, outlined in Chapter 7, demonstrated that that ‘end’ is achievable when the starting point is the distribution of obligations. The objective criterion upon which distribution is achieved is the ‘common but differential responsibilities’ criterion, which is an expression of the ‘nil-to-absolute’ distribution of burdens that is the objective criterion on which international distributive justice distributes obligations. This Chapter demonstrated also that some of the principles of the UNFCCC and the Kyoto Protocol are consistent with the international distributive justice principle when they distribute obligations, but not consistent with it when they distribute goods. Therein lies one essential ‘objectivity’ distinction: international distributive justice does not build itself upon any criterion that would oblige the redistribution of goods, so no notion of (moral/ethical) entitlement to goods can arise. The other essential ‘objectivity’ distinction, also demonstrated in Chapter 7 with reference to the GATT Article XX chapeau, is that there is no incursion of the international distributive justice principle into the moral/ethical attitudes of sovereign nations to the preservation of human and animal

life and health. It is submitted that the objectivity of criteria is sufficiently determined when criteria do not derive from notions about entitlement to goods, nor from moral/ethical attitudes.

9.4 Contribution to the literature

It is submitted that the substantial contribution of this thesis is the radical proposal that the WTO legal regime be recognised for what it is, that is, a law of obligations, and that WTO obligations be distributed, on the basis of the objective GDP criterion, in accordance with the principle of international distributive justice, a principle distilled by this thesis writer from the ‘distributive justice’ discourses of Rawls, Pogge and Garcia.

The other contribution is the proposal that the self-designated ‘developing country’ status that is current in the WTO legal scheme be abandoned, and replaced by an objective designation based on GDP status. This thesis writer pointed out that the ‘Annex 1, non-Annex 1’ distinction of the Kyoto Protocol is closely akin to the proposed GDP-status designation that the proposed international distributive justice principle requires. GDP status serves to illustrate WTO obligations-bearing capacity, whereas self-designation has ceased to have a point since its one discernible purpose, WTO-compliance deferral time, is no longer available to any developing country other than the least-developed ones. This ‘developing country’ designation has not only run its course; it is also a designation that failed to be an umbrella of ‘like’ entities, as the very different effects upon the so-designated entities, the UAE, Brazil and Bangladesh, has demonstrated. Also, this thesis demonstrated that the SDT principle has not been applied to any good effect for least

developed countries, either in the DSM, or in the effects of the WTO Agreements upon their economies. It is submitted that the identification of these shortcomings make out the case for introduction into the WTO legal scheme of the international distributive justice principle.

This thesis outlined the requirements of a new climate law built on the principle of international distributive justice, demonstrating that this law can be WTO-compatible so long as it does not intrude upon the GATT Article XX chapeau provisions for national sovereignty in matters of moral/ethical judgment. It is submitted that in doing this, this thesis called attention to (i) a natural limitation of the WTO regime, a regime without a legislative facility and therefore unable to control enterprises such as oil and gas extraction that operate outside WTO law, and to (ii) the adverse extra-WTO impacts of investors on WTO member states' economic health and climate-change mitigating capacities. It is submitted further that having called attention to (i) and (ii), this thesis writer has helped refocus the debate in the literature about the need for the modification of the WTO legal regime to a debate about the need to regulate investor and gas-and-oil extracting activities, and thereby correct the ill-informed perceptions that attribute all impediments to development to the WTO regime's inadequacy.

This thesis writer submits that the following observation of this thesis contributes two fresh perspectives to the WTO-regarding discourse: (i) paragraph 31(i) of the Doha Declaration constitutes the *de facto* licence for the addition of a new climate law to the WTO legal framework, and 'common but differentiated responsibilities' concept

dominant in MEAs is the concept that aligns MEAs and WTO Agreements,⁸⁷³ and (ii) this supports the conclusion that the obligations-allocating international distributive justice principle is the appropriate regulating principle of all WTO Agreements.

I submit respectfully that my thesis has attained its objectives, and that it has met the requirement that a doctoral thesis contribute to scholarship in the area of its research.

⁸⁷³ See section 7.1 and section 3.7.1 - 3.7.5 of this thesis.

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